Supreme Court, U.S.
FILED

No. 98 704 OCT - 9 1998

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

SOMMERDYKE ESTATE
Petitioners,

v.

CITY OF KENTWOOD
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN A. HILGER
Counsel of Record

ARTHUR C. SPALDING
MOLLY M. MCNAMARA
RHOADES, MCKEE, BOER,
GOODRICH & TITTA
161 OTTAWA AVENUE NW
SUITE 600
GRAND RAPIDS, MI 49503
(616) 235-3500

Attorneys for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

137pp

QUESTION PRESENTED

1. Does Michigan's Highway By User Statute, which mandates a highway established by user to be four rods (66 feet) in width (two rods or 33 feet on either side of the centerline) constitute a taking without payment of just compensation and without due process of law when, as in this case, only 32 feet (16 feet on either side of the centerline) of real property was actually used for highway purposes?

PARTIES TO THE PROCEEDING

Petitioners

Charles D. Waddell and Fernando Cioni[1]

Respondent

City of Kentwood

---

[1] Mrs. Waddell passed away during the pendency of this case.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

ARGUMENT FOR GRANTING WRIT 7

Argument I
A Statute Which Destroys Fee Simple Interest In Real Property Without Just Compensation And Without Proof Of Actual Public Use Violates The Taking Clause of the Fifth Amendment. 8

A. On its face, the highway by user statute authorizes the state to take more property than is actually used by the public without payment of just compensation and without due process of law in violation of the Taking Clause of the Fifth Amendment. 9

B. The Michigan Supreme Court's decision cannot be reconciled with the rulings from this Court on which its decision relies. 12

C. The legal fiction of implied dedication, which requires the private property owner to perform an affirmative act to retain land not actually used by the public, is unconstitutional. 16

Argument II
Michigan's Highway By User Statute Deprives Private Property Owners Of Real Property Without Due Process Of Law. 19

A. Michigan's highway by user statute provides insufficient notice that the state may take more property than is actually used by the public for highway purposes. 19

B. The Michigan Courts' inconsistent interpretation of the highway by user statute precludes the statute from providing adequate notice. 21

C. The inconsistent and unequal application of the highway by user statute denies property owners their due process rights. 22

CONCLUSION 25

APPENDIX

Appendix A
Michigan Supreme Court Opinion, 7/31/98 ..... 1a

Appendix B
Transcript excerpt from Seventeenth Judicial Circuit Court Hearing on Motion for Summary Disposition, 8/25/95 ..... 72a

Seventeenth Judicial Circuit Court's Order Denying Motion for Summary Disposition, 9/6/95 ..... 79a

Stipulated Facts and Waiver of Jury Trial, 11/11/96 ..... 81a

Seventeenth Judicial Circuit Court Opinion, 3/20/97 ..... 87a

Appendix C
Judgment in Condemnation, 4/16/97 ..... 100a

TABLE OF AUTHORITIES

Cases

Alton v. Meeuwenberg,
66 N.W. 571 (1890) 16, 21

Armstrong v. United States,
364 U.S. 40 (1960) 18

Barfnecht v. Town Bd. of Hollywood Twp.,
232 N.W.2d 420 (1975) 11, 20

Bell v. Burson,
402 U.S. 535 (1971) 22

Board of Regents v. Roth,
408 U.S. 564 (1972) 12, 13, 19

City of Kentwood v. Sommerdyke Estate,
456 Mich. 868; 569 N.W.2d 616 (1997) 1, 5, 7
13,15, 16 21, 22

Coleman v. Flint & P.M.R. Co.,
31 N.W. 47 (1887) 21

Dolan v. City of Tigard,
512 U.S. 374 (1994) 10

Eager v. State Highway Comm'r.,
136 N.W.2d 16 (1965) 5, 10, 11, 20, 21

Eyde Bros. v. Eaton Co. Drain Comm'r.,
398 N.W.2d 297 (1986) 23

Jaschuk v. Manistee County Road Commission,
517 N.W.2d 318 (1994) 3

Keidel v. Rask,
304 N.W.2d 402 (N.D., 1981) 11

Kent Co. Rd. Comm'n. v. Hunting,
428 N.W.2d 353 (1988) 23

Nollan v. California Coastal Comm'n.,
483 U.S. 825 (1986) 16, 17, 18

Paul v. Detroit,
32 Mich. 108 (1875) 10

Pearl v. Torch Lake Twp.,
248 N.W.2d 242 (1976) 23

Pennsylvania Coal v. Mahon,
260 U.S. 393 (1922) 10

Peterman v. Department of Natural Resources,
521 N.W.2d 449 (1994) 10

Rigoni v. Michigan Power Co.,
345 N.W.2d 918 (1984) 23

Scheimer v. Price,
32 N.W. 873 (1887) 21

Schroeder v. City of New York,
371 U.S. 208 (1962) 19

Smith v. State Hwy. Comm'r.,
198 N.W.2d 936 (1924) 16, 21

Stanley v. Illinois,
405 U.S. 645 (1972) 22

Texaco v. Short,
454 U.S. 516 (1982) 12, 14, 15

Usher v. Mobbs,
493 N.Y.S.2d 531 (1985) 11

VanSlooten v. Larsen,
299 N.W.2d 704 (1980) 11, 12, 23

Walker v. City of Hutchinson,
352 U.S. 112 (1956) 19

Wayne Co. Savings Bank v. Stockwell,
48 N.W. 174 (1891) 21

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 7, 12

Statutes

U.S. Const. amend. V 2

U.S. Const. amend. XIV § 1 2

U.S. Const. 1963, art. I § 17 2

Mich. Const. 1963, art. X § 2 3

28 U.S.C. § 1257(a) 1

Mich. Comp. Laws Ann. §§ 213.171 and 213.361
(West 1998) (Mich. Stat. Ann. §§ 8.171 and
8.361(1) [Lexis 1997]) 9

Mich. Comp. Laws Ann. § 221.20 (West 1990)
(Mich. Stat. Ann. 9.21 [Lexis 1997]) 3, 8, 9, 10

Mich. Comp. Laws Ann. § 560.253 (West 1988)
(Mich. Stat. Ann. § 26.430(253)
[Law. Co-op. 1993]) 9

Secondary Materials

Black's Law Dictionary (6th ed.) 11

OPINIONS BELOW

The Michigan Supreme Court granted leave to appeal in this matter on September 23, 1997, bypassing decision by the Michigan Court of Appeals. *City of Kentwood v. Sommerdyke Estate*, 456 Mich. 868; 569 N.W.2d 616 (1997). The Michigan Supreme Court decided several procedural motions and motions granting leave to file amici curiae briefs. Disposition of these motions is reported at 573 N.W.2d 615; 575 N.W.2d 554 (1998); and 575 N.W.2d 548 (1998). The Michigan Supreme Court's decision is reported at 458 Mich. 642; 581 N.W.2d 670 (1998), and is printed at Appendix A.

The Circuit Court for the County of Kent issued its opinion in this matter on March 20, 1997. The Circuit Court opinion is printed at Appendix B, pp. 87a-99a. The Circuit Court entered Judgment in Condemnation on April 16, 1997. The Judgment is printed at Appendix C.

JURISDICTION

The Michigan Supreme Court issued its opinion on July 31, 1998. This Petition for Writ of Certiorari is being filed within 90 days of the issuance of that opinion. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Const. 1963, art. I § 17

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Mich. Const. 1963, art. X § 2

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

GENERAL HIGHWAY LAW

CHAPTER I--LAYING OUT, ALTERING AND DISCONTINUING HIGHWAYS

221.20. Public highway; definition, width

Sec. 20. All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

Mich. Comp. Laws Ann. § 221.20 (West 1990) (Mich. Stat. Ann. § 9.21 [Lexis 1997]).

STATEMENT OF THE CASE

The material facts in this property rights action are undisputed. The only dispute in this matter concerns the constitutionality of Michigan's highway by user statute.[2]

On May 20, 1994, the City of Kentwood brought a condemnation action for the purpose of widening 52nd Street between Breton and East Paris Avenues in the City of Kentwood, Michigan. The City sought to accommodate existing and anticipated traffic patterns.

Petitioners owned one of the parcels affected by the condemnation action. Petitioners conceded that the 10 foot wide asphalt street and the adjacent 6 foot wide shoulder and ditch area lying south of the centerline of 52nd Street, which were actually used by the public for highway purposes, constituted a highway by user. Petitioners did not claim entitlement to just compensation for that 16 foot wide area. The City agreed that Petitioners were entitled to receive just compensation for the land located between 33 feet south of the center line and 50.03 feet south of the center line of 52nd Street. Accordingly, this dispute involved only the land located between 16 feet south of the center line and 33 feet south of the center line of 52nd Street.

On August 1, 1995, the City filed a motion for summary disposition, arguing that because 52nd street had been used as a public highway for decades, the City's highway right of way was presumptively 33 feet wide on either side of the center line of 52nd Street pursuant to the highway by user statute. In

---

[2] There are hundreds of thousands of miles of highways created by user in the United States. In Michigan alone, the number of miles of highways established by user approaches 100,000.

because it fails to provide adequate notice to property owners whose land abuts a highway established by user that the intent of the government was to take more land than was actually used by the public.

ARGUMENT FOR GRANTING WRIT

> [A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

In contravention of the above stated legal principal, Michigan's highway by user statute requires a property owner to assert his right to property within the 66 feet prescribed by statute in some manner "calculated to interfere with, disturb or interrupt the use by the public, or by instituting an action in court." (App. A, p. 17a). The burden to file suit or take some action to preserve an interest in property rests with the property owner regardless of how much or how little of the 66 feet is actually used by the public for highway purposes. By affirming this statutory scheme, the Michigan Supreme Court has condoned the taking of private property for public use without just compensation and without due process of law in violation of the United States Constitution.

As Justice Weaver's well reasoned dissent explains, the majority reached its erroneous conclusion based on its misperception of United States Supreme Court precedent. (App. A, pp. 55a-62a). Because this case involves the scope of

response, Petitioners filed a cross motion in limine asserting that the highway created by the highway by user statute is not presumptively 66 feet in width, but is limited to the area of actual use. The trial court denied the City's motion for summary disposition, determining that the decisions in *Eager v. State Highway Comm'r.*, 136 N.W.2d 16 (1965), and *Jaschuk v. Manistee County Road Commission*, 517 N.W.2d 318 (1994), controlled the outcome of this case. (App. B, pp. 75a, 78a-80a). Both *Eager* and *Jaschuk* held that the implied dedication under the highway by user statute applies only to the extent of the actual public use. *Eager*, *supra*, at 154; *Jaschuk*, *supra*, at 324.

As a result of the trial court's ruling, and because there were no material factual issues in dispute, the parties waived the right to a jury trial and submitted the case for decision on stipulated facts. (The stipulated facts are included in Appendix B, pp. 81a-86a). The trial court issued its written opinion on March 20, 1997, holding that the highway created in accordance with the highway by user statute applies only to the extent of actual use. The trial court found in favor of Petitioners and awarded $26,210.89 as just compensation for the land taken, including the land in dispute. (App. B, pp. 99a). A Judgment in Condemnation was entered by the trial court on April 16, 1997. (App. C).

The City filed a claim of appeal with the Michigan Court of Appeals on May 5, 1997, and filed an application for leave to appeal to the Michigan Supreme Court on June 2, 1997. On September 23, 1997, the Michigan Supreme Court granted the City's application for leave to appeal, granted motions to appear as amici curiae, and invited other interested persons or groups to move for permission to file briefs amici curiae. *City of Kentwood v. Sommerdyke Estate*, 569 N.W.2d 161 (1997). The Michigan Supreme Court issued its opinion on July 31, 1998.

Justice Cavanaugh, writing for a four justice majority, held that "a state may condition the retention of a property right on the performance of an affirmative action within a reasonable statutory period." (App. A, p. 10a). The majority determined that because there was no evidence that Petitioner's predecessors in title took affirmative action to protect their interest in the property during the statutory period, the original property owners impliedly dedicated the full four rods to the state. The majority concluded that the Taking Clauses of the United States and Michigan Constitutions were not implicated because Petitioners never owned the property in question.

Justice Taylor filed a separate opinion concurring in part and dissenting in part. (App. A, pp. 31a-41a). According to Justice Taylor, the highway by user statute creates a prescriptive easement and does not destroy an abutting landowner's fee simple interest in the property. Justice Taylor reasoned that because the land owner retains the fee simple interest in the property, and because the highway right of way is established only through the abutting landowner's acquiescence in the use of a portion of his land as a highway, the Taking Clauses of the United States and the Michigan Constitutions are not implicated.

Justice Weaver, joined by Justice Brickley, dissented. (App. A, pp. 41a-71a). According to the dissenters, the majority's interpretation of the highway by user statute condones the seizure of real property without payment of just compensation in violation of the Taking Clauses of the United States and the Michigan Constitutions. The dissent reasoned that because a holder of fee simple title is not required to use his land or to act in any way to prevent losing title unless there is an adverse user, the state cannot require a fee simple title holder to take affirmative action to retain his right in property not actually used by the public. The dissent also determined that Michigan's highway by user statute violates Due Process

the government's authority to take property, and because this issue is relevant to every property owner in every state in which highways are established by user, this Court's review is warranted. Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

ARGUMENT I

A Statute Which Destroys Fee Simple Interest In Real Property Without Just Compensation And Without Proof Of Actual Public Use Violates The Taking Clause of the Fifth Amendment.

Pursuant to the Fifth Amendment, "[N]or shall private property be taken for public use, without just compensation." Michigan's highway by user statute violates the Fifth Amendment prohibition on the government's taking of private property without payment of just compensation. The statute authorizes the state to take more land than is actually used by the public for highway purposes. Specifically, the highway by user statute states:

> All highways regularly established in pursuance of exiting laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been eight years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. ***All highways that are or may become such by time and use, shall be 4 rods in width***, and where they are

> situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

Mich. Comp. Laws Ann. § 221.20 (West 1990) (Mich. Stat. Ann. § 9.21 [Lexis 1997]) (emphasis added).

Facially, the highway by user statute is confiscatory. Additionally, the presumption of implied dedication read into the statute by the Michigan Supreme Court effects a taking of private property without payment of just compensation and without proof of public use. As written and as applied, the highway by user statute violates the Taking Clause of the Fifth Amendment.

A. On its face, the highway by user statute authorizes the state to take more property than is actually used by the public without payment of just compensation and without due process of law in violation of the Taking Clause of the Fifth Amendment.

In Michigan, property can become a highway in one of three ways: (1) through formal dedication by a property owner[3]; (2) through purchase by a public body of the entire right of way,[4] or (3) through use by the public for the statutorily prescribed time period, i.e. "highway by user."[5] As written, Michigan's highway by user statute mandates that a private

---

[3] See Mich. Comp. Laws Ann. § 560.253 (West 1988) (Mich. Stat. Ann. § 26.430(253) [Law. Co-op. 1993]).

[4] See Mich. Comp. Laws Ann. §§ 213.171 and 213.361 (West 1998) (Mich. Stat. Ann. §§ 8.171 and 8.361(1) [Lexis 1997])

[5] Mich. Comp. Laws Ann. § 221.20 (West 1990) (Mich. Stat. Ann. § 9.21 [Lexis 1997]).

property owner relinquish 66 feet of property (33 feet if ownership lies on only one side of the highway centerline) without regard to the width of the property actually used by the public for highway purposes. Under the statute, if any portion of a private property owner's land is used as a highway for the statutory time period, the entire 66 feet of property is taken without payment of just compensation to the private property owner. Such a taking is not permitted by law. "[I]t can never by lawful to compel any man to give up his property, when it is not needed, or lose it, whether needed or not, without being made whole." *Peterman v. Department of Natural Resources*, 521 N.W.2d 499, 504 (1994) (quoting *Paul v. Detroit*, 32 Mich. 108, 119 [1875]). "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994)(quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

In the past, the Michigan Supreme Court had expressly recognized that a facial application of the highway by user statute would violate the constitutional prohibition against taking private property without just compensation.

> We agree with the trial court that ***privately owned land cannot become public road by user beyond the portion used as such merely by the above quoted statutory pronouncement to that effect.*** To so hold would be violative of Constitution of 1850, art. XVIII, § 14, Constitution 1908, art. 13, § 1, which prohibited taking by the public of private property except upon determination of necessity and just compensation "being first made or secured."

Eager, *supra*, at 18 (emphasis added).[6]

The very concept of "user" mandates that the state use the property for the purpose intended before the property can be taken. "User" is defined as the "**actual** exercise or *enjoyment* of any right, property, drugs, franchise, etc." Black's Law Dictionary (6th ed.) p. 1543 (emphasis added). By authorizing the government to take more property than is actually used for highway purposes, the highway by user statute condones the taking of private property without payment of just compensation in violation of the Taking Clause of the Fifth Amendment.[7] "Statutes which require property owners in possession to institute a proceeding within a specified time or lose their property have been held unconstitutional because a state cannot require one in possession of all that he demands to prosecute a suit to preserve his interest when no adverse interest is asserted by suit or possession." *VanSlooten v.*

---

[6] Justice Weaver and Justice Taylor recognize that the *Eager* holding cannot be reconciled with the majority's holding in this case. The majority, however, does not read *Eager* as declaring the highway by user statute unconstitutional. (App. A).

[7] Other jurisdictions to address this issue have determined that a public highway established by user is only as wide as the actual use. See e.g., *Usher v. Mobbs*, 493 N.Y.S.2d 531 (1985) ("Where a road has obtained its character as a public highway by user, its width is determined by the width of the improvement. . . To do otherwise would be taking real property without due process of law in violation of the Federal and State Constitution."); *Keidel v. Rask*, 304 N.W.2d 402 (N.D., 1981) ("Privately owned land cannot become public road by adverse use beyond the portion so used merely by statutory pronouncement to that effect"); *Barfnecht v. Town Bd. of Hollywood Twp.*, 232 N.W.2d 420 (1975) ("[A] dedication by public use cannot constitutionally exceed the amount of actual dedication.").

Larsen, 299 N.W.2d 704, 709 (1980). See also, *Webb's Fabulous Pharmacies*, supra.

B. The Michigan Supreme Court's decision cannot be reconciled with the rulings from this Court on which its decision relies.

The majority opinion avoided addressing Petitioner's facial challenge to the constitutionality of the highway by user statute. Instead, the majority opinion focused on the legal fiction of implied dedication. According to the majority, the legislature has the power to condition a private property owner's retention of his fee simple interest in real property on his performance of certain affirmative actions. In the context of the highway by user statute, an owner of private property abutting a highway established by user impliedly dedicated the land to the public for use as a highway. The width of the land dedicated is presumed to be 66 feet regardless of the extent of actual use by the public. If the private property owner does nothing to preserve an interest in the property within the statutory period (10 years), then the fee simple interest in the property is destroyed.

The majority's determination that the legislature can draft a statute that destroys a fee simple interest in real property, without payment of just compensation and without proof of actual use, sanctions the unconstitutional seizure of private property. In support of its holding, the majority relies on two opinions from this Court, *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Texaco v. Short*, 454 U.S. 516 (1982). Neither case lends support for the majority's decision.

The majority cites *Board of Regents* for the proposition that a state may create and define the dimensions of interests in property. The question at issue in *Board of Regents*, was

whether a nontenured professor had a property interest in continued employment entitling him to a due process hearing when the university declined to renew his employment contract. In determining that the nontenured professor did not have a property interest in continued employment, this Court recognized that real property rights do enjoy a protected status.

> . . . the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money.

Board of Regents, supra, at 571-572.

The *Board of Regents* Court also explained, "when protected interests are implicated, the right to some kind of prior hearing is paramount." *Id.* at 569-570.

In citing *Board of Regents* to support the proposition that the state can condition private property owners' retention of their fee simple interest in real property on the performance of some affirmative act, the Michigan Supreme Court misperceived the import of that decision. Most notably, *Board of Regents v. Roth* is not a Taking Clause case, it is a Due Process case. The *Board of Regents* decision concerns only the determination of the existence of a constitutionally protected property right. That case did not address the constitutional safeguards that must be observed where, as here, the existence of a constitutionally protected real property right is already established.[8] As the dissent in *City of Kentwood* recognized, application of the *Board of Regents* decision in this case,

---

[8] The Fifth Amendment assurance of just compensation for the taking of private property certainly must be included in the litany of fundamental rights.

"where the existence of a protected property interest (fee simple title) is not in doubt, is illogical." (App. A, p. 56a).

The majority then cited this Court's decision in *Texaco v Short*, 454 U.S. 516 (1982), for the proposition that states may permit unused interests in property to revert to another after the passage of time. *Id.* at 526. *Texaco* involved the constitutionality of the Indiana mineral lapse act, which caused the ownership of mineral interests to lapse if the interest went "unused" for a period of twenty years. While this Court upheld the constitutionality of the mineral lapse act, it recognized the limited application of its decision.

The *Texaco* Court first addressed the question "whether the State has the power to provide that **property rights of this character** shall be extinguished if their owners do not take the affirmative action required by the State." *Id.* at 525 (emphasis added). Thus, the *Texaco* Court limited the case's application to the types of property interests involved in that case, namely, fractional mineral interests, reserved or severed from the surface estate, and oil and gas leases. Further, the *Texaco* Court expressly indicated that the holding in that case did not apply to property interests of a different character.

> [T]he length of the period that is afforded to a mineral owner to use the interest, the variety and minimal extent of the actions that constitute a statutory use, and the length of the statutory grace period are sufficient to entitle the State to indulge in the assumption that -- if no statutory use is made in a twenty year period and no statement of claim is filed in the two year grace period, if applicable -- the mineral owner has **abandoned** the **property**. **We need not decide today whether this state may indulge in a similar assumption**

> **in cases in which the statutory period of nonuse is shorter than that involved here, or in which the interest affected is such that concepts of "use" and "nonuse" have little meaning.**

Id. at 536, n. 28 (emphasis added).

By its language, the *Texaco* analysis does not apply to fee simple interests in land because the concepts of "use" and "nonuse" have little meaning to the fee simple interest. As the dissent in *City of Kentwood* points out, "The holder of fee simple title is not required to use his land or to act in any way to prevent his losing it unless there is an adverse user." (App. A, p. 59a). Simply put, mineral rights and fee simple real property rights are property rights of such different character that the *Texaco* decision does not address fee simple interests in real estate. The majority's application of the Texaco decision in this case was "improper." (App. A, p. 59a).

C. The legal fiction of implied dedication, which requires the private property owner to perform an affirmative act to retain land not actually used by the public, is unconstitutional.

The main flaw in the majority's analysis is that it equates the concepts of lapse or abandonment with a fee simple property owner's failure to dispute a nonexistent user, and incorrectly employs the concept of implied dedication. The necessary elements of implied dedication are offer by the owner and acceptance by the public. *Smith v. State Hwy. Comm'r.*, 198 N.W.2d 936 (1924). The parties' intentions are determined by their actions.

Implied dedication is a legal fiction. The law implies a fictional offer from the property owner's acquiescence to public use of his private property. The public entity demonstrates its acceptance of the fictional offer by actually working and using the property for public purposes. If the public entity works and uses only a portion of the four rods of property contemplated by the statute, only that portion would become a public highway, The remainder would be simply a fictional offer to dedicate, never accepted by the public. *Alton v. Meeuwenberg*, 66 N.W. 571 (1890). "[I]t is the evidence of public use and maintenance by public authorities that is determinative of the existence of a public highway. Failure by the public to use the full four rods anticipated by the highway-by-user statute simply results in the public's acquiring less than four rods." (App. A, p. 46a).

As interpreted by the majority, Michigan's highway by user statute effects the same result that this Court would have found unconstitutional in *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1986). In *Nollan*, this Court

recognized that requiring a permanent easement across private property for public use constitutes a taking.

> ***Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach***, rather than conditioning their permit to rebuild their house on their agreeing to do so, ***we have no doubt there would have been a taking.*** To say that the appropriation of a public easement across a landowner's premises does not constitute a taking of a property interest but rather . . . "a mere restriction on its use," . . . is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. . . . Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental actions leads to the same conclusion. ***We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'***

Id. at 831 (citations omitted) (emphasis added).

Michigan's highway by user statute destroys Petitioners' fee simple interest in property, making the property

available to the public on a permanent basis. In *Nollan*, California Coastal Commission's attempt to condition a building permit on the uncompensated conveyance of a permanent easement across the Nollans' property constituted a taking. Certainly, then, Michigan's highway by user statute, which mandates an uncompensated implied conveyance of a fee simple interest in real property to the government constitutes a taking. Under this Court's analysis in *Nollan*, the Michigan highway by user statute constitutes a taking which requires the payment of just compensation. *Id.*

At its core, this case concerns the financing of public improvements. The City does not want the financial burden of having to compensate private property owners when it takes or uses private property for highway purposes. However, financing public improvements is one of the responsibilities of government. Individual private property owners should not be required to subsidize highway improvements by being forced to relinquish their property without receiving just compensation.

> One of the principal purposes of the Takings Clause is "to bar Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Id. at 835, n. 4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 [1960]).

If the City wants to expand 52nd Street, "it must pay for it." *Nollan, supra*, at 842.

ARGUMENT II

Michigan's Highway By User Statute Deprives Private Property Owners Of Real Property Without Due Process Of Law.

As this Court explained in *Board of Regents*, when protected property interests are implicated, the right to some kind of prior hearing is paramount. *Board of Regents, supra*, at 570. Minimum standards of due process require reasonable notice as well as an opportunity to be heard before individuals can be deprived of their property rights. In this case, the highway by user statute fails to provide sufficient notice, fails to provide for any kind of prior hearing, and is therefore unconstitutional.

A. Michigan's highway by user statute provides insufficient notice that the state may take more property than is actually used by the public for highway purposes.

This Court has held that the notice required when real property is taken is more than the mere enactment of a statute. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956). For example, in *Walker*, this Court held that newspaper publication of condemnation proceedings provided notice inadequate to satisfy due process. *Id.*, at 116. In *Schroeder v. City of New York*, 371 U.S. 208 (1962), this Court held that posting notices on trees and publishing notices in newspapers was insufficient to satisfy due process where a person's name and address are known or easily ascertainable.

Michigan's mere enactment of the highway by user statute fails to provide any notice to past, present or future property owners that the intent of the public entity at the time the highway was established by use was to take more property

than was actually used for highway purposes. Earlier, the Michigan Supreme Court specifically rejected the concept that the highway by user statute provided sufficient notice to compel the public entity's assertion of right to land not included in the public use.

> In the instant case there had been no dedication, except as such may be implied or presumed from user for more than the statutory period of repose, but such implied dedication, as last above indicated, applies only to the extent of the user. And for good reason, because the implications of dedication resulting from the owner's permitting uninterrupted public user as a road for the statutory period arises from the fact that such user and statute governing same give the owner notice that, if he means to dispute the rightfulness of the public user, he must assert his right within the statutory period by physical action or suit. **Such notice could not be said to apply to lands not included in the public user.**

Eager, *supra*, at 18-19 (emphasis added)(citations omitted).

Simply put, it is use by the public that puts a private property owner on notice. "There is no reason that an owner should know that he is required to dispute the rightfulness of a nonexistent user. A property owner thus receives no notice as to a public claim on any property in excess of that which has actually been used." *Barfnecht*, *supra*, at 423.

B. The Michigan Courts' inconsistent interpretation of the highway by user statute precludes the statute from providing adequate notice.

The mere enactment of the highway by user statute provides insufficient notice the of the public entity's intention to take more land than is actually used for public purposes given the Michigan Supreme Courts' inconsistent holdings concerning the meaning of the highway by user statute and the statute's constitutionality. A long line of cases in Michigan has held that highways established by user are only as wide as the extent of the public use. As early as 1887, the Michigan Supreme Court has intimated that a highway established by user was limited to the area of actual public use for highway purposes.[9]

Thus, a private property owner whose land abutted a highway established by user could reasonably have understood the highway to be only as wide as the public use. That property owner in 1887 could reasonably have understood that he needed to take no action, nor institute any legal proceeding to preserve his fee simple interest in property abutting the highway, but not used by the public for highway purposes. Given Michigan's historical understanding of the highway by user statute, "[i]t is fundamentally unfair to take a modern property owner's land because of a predecessor's failure to act, when it would have reasonably been understood by the predecessor, given the decisions of [the Michigan Supreme Court], that no action was necessary to limit the width of a public highway to the extent actually used." (App. A, p. 68a).

---

[9] See *Eager*, *supra*; *Smith*, *supra*; *Alton*, *supra*; *Wayne Co. Savings Bank v. Stockwell*, 48 N.W. 174 (1891); *Scheimer v. Price*, 32 N.W. 873 (1887); *Coleman v. Flint & P.M.R. Co.*, 31 N.W. 47 (1887).

C. The inconsistent and unequal application of the highway by user statute denies property owners their due process rights.

Inconsistencies in the application of the highway by user statute leave private property owners at distinct disadvantage and thereby violate private property owner's Due Process rights. First, the public entity should be required to bear the burden of proving acceptance of the fictional offer to dedicate by proving actual use. In order to protect individual rights, courts have continually interpreted the due process clauses to require the government, rather than the individual, to bear the burden of proof when the most important individual rights are at stake.[10] Michigan, however, has impermissibly shifted the burden of proof to the private property owner. Under the highway by user statute, rather than the public entity proving acceptance of the fictional offer through actual use, the private property owner bears the burden of proving that the fictional offer was of less than four rods.

In order to meet this burden of proof, the private property owner must assert his right to the property within the prescribed period by either initiating a quite title action, or by physically interfering with the public use. This proof scheme begs the question: How can a private property owner interfere with a nonexistent public use? The only way a private property owner can assert his right to property not actually being used by the public is to institute suit, thereby unconstitutionally

---

[10] See e.g., *Stanley v. Illinois*, 405 U.S. 645, 658 (1972)(holding unconstitutional the state's presumption that an unwed father was an unfit parent, due process requires the state to prove the unwed father's unfitness); *Bell v. Burson*, 402 U.S. 535 (1971)(holding that the state cannot deprive a citizen of a driver's license without a hearing to assess fault).

changing private property rights into mere causes of action. *VanSlooten, supra*. In contrast, the highway by user statute requires the public to do nothing to assert its acceptance of land outside the boundary of actual use.

Second, private property owners are held to a higher standard of proof to establish interference with a "public use" than the public entity is held to establish public use. For example, in *Kent Co. Rd. Comm'n. v. Hunting*, 428 N.W.2d 353 (1988), the landowners were required to show that they or their predecessors in title took some action within the statutory period, or by 1925, ten years after the township had expended funds on the road. When the landowners established that historically significant trees had been planted on the property approximately 100 years before the litigation (i.e. before 1925), the court held this insufficient to rebut the presumption because the property owners were unable to conclusively establish exactly when the trees were planted.

In *Eyde Bros. v. Eaton Co. Drain Comm'r.*, 398 N.W.2d 297 (1986), the court held that evidence that the private property owner mowed the grass within the four rod area was insufficient to rebut the presumption of implied dedication of the full four rods. The *Eyde* Court made that finding even though the public entity had done nothing, not even routine maintenance, to give notice of its acceptance of the implied dedication outside the portion of the highway actually used as such. It is interesting to note, however, that mowing grass had been held to be evidence of a public use sufficient to establish the width of a highway by user. *Rigoni v. Michigan Power, Co.*, 345 N.W.2d 918 (1984); *Pearl v. Torch Lake Twp.*, 248 N.W.2d 242 (1976).

Third, the burden of proof placed on the modern day property owner is virtually insurmountable. The property owner must first prove the date from which the statutory period

began to run. Given that the highways were established by user, rather than formal dedication, most highways by user are not recorded. The property owner must next prove that a predecessor in interest took some action within the statutory period to preserve his right to the property. As mentioned above, given the case law, it is unlikely that any predecessor in title knew that action was necessary to preserve his interest in land not used. Furthermore, physical proof of fences or other physical obstruction may have long ago been removed. Testimony from witnesses may be unavailable by death or faded memories. Unlike the mineral lapse statute, the highway by user statute provides no simple procedure by which a private property owner could make a record of his intent to protect his interest in property with the four rod area not used for highway purposes.

In sum, the highway by user statute unfairly and unconstitutionally places on a private property owner a burden that is virtually impossible to meet. The proof scheme established by the Michigan Supreme Court sanctions the taking of private property without payment of just compensation, without notice to the property owner, and without proof of actual public use.

CONCLUSION

The Taking Clause and the Due Process Clause of the United States Constitution require that a highway established by user include only that land actually used for highway purposes. The Michigan Supreme Court's decision to the contrary sanctions the seizure of private property without payment of just compensation and without due process of law. Petitioners respectfully request that this Court issue a writ of certiorari to review the decision of the Michigan Supreme Court.

/s/_____
STEPHEN A. HILGER
Counsel of Record

RHOADES, MCKEE, BOER,
GOODRICH & TITTA
161 Ottawa Ave., N.W.
Suite 600
Grand Rapids, MI 49503
(616) 235-3500

APPENDIX A

CITY OF KENTWOOD v SOMMERDYKE ESTATE

Docket No. 109646. Argued March 3, 1998

(Calendar No. 7). Decided July 31, 1998.

The city of Kentwood brought a condemnation action in the Kent Circuit Court, to widen and improve 52nd Street, claiming that the entire area within thirty-three feet of the centerline of 52nd Street had become a highway by user. The property owners conceded that the ten-foot wide asphalt street and an additional six-foot wide shoulder and ditch had become a highway by user, but disputed the land between sixteen and thirty-three feet from the centerline. The court, H. David Soet, J., held that a highway created in accordance with the highway-by-user statute, MCL 721.20; MSA 9.21, applied only to the extent of actual use, finding in favor of the .property owners and awarding just compensation. The Supreme Court granted the city leave to appeal before decision by the Court of Appeals. 456 Mich 868 (1997).

In an opinion by Justice CAVANAGH, joined by Chief Justice MALLETT, and Justices BOYLE and KELLY, the Supreme Court held:

The state may condition the retention of certain property rights on the performance of an affirmative action within a reasonable statutory period. The highway-by-user statute is constitutional and does not create a taking of property without just compensation.

1. The highway-by-user statute provides that a property interest in unused property is of less than absolute duration and that retention of such an interest is conditioned on the performance of certain actions within a ten-year period. The statute does not treat such property as abandoned, but as impliedly dedicated to the state for public use if the property owner fails to rebut the presumption of dedication within the ten-year period of limitation. The requirement is neither unreasonable nor arbitrary.

2. Where there is evidence that a presumption of dedication has been rebutted within the statutory period, privately owned land cannot become a public road merely because the statute presumes the road to be four rods wide. A public road is only as wide as actual use where the plaintiff presents evidence that the presumption of dedication has been rebutted within the statutory period of repose. If the presumption is not rebutted within the statutory period, the road is deemed dedicated to the full extent of the four-rod width. The Taking Clauses of the United States and Michigan Constitutions are not implicated. After dedication, the former owner retains no interest for which compensation may be claimed. It is the owner's failure to make any use of the property and not the action of the state that causes the lapse of the property right. There is no taking that requires compensation.

3. The property at issue became property of the state when the road was created by use. It was deemed dedicated to the state because there was no contrary action taken within the statutory period. No evidence was presented

that the original property owners rebutted the presumption of dedication within the period of limitation. Because the property in question was never owned by the defendants, they cannot claim a right to it.

Reversed.

Justice TAYLOR, concurring in part and dissenting in part, stated that the highway-by-user statute is a legislative modification of the common law of prescriptive easement that vests the right to use such roads in the public at large. Because the state has only obtained an easement, the landowner retains a fee simple interest in the property. The landowner's acquiescence in the use of a portion of the land as a highway, precludes any finding of a taking. The enactment and publication of the highway-by-user statute is sufficient to put a landowner on notice that acquiescence in the creation of a highway by user across the land will create a right of way four rods in width, even if less is actually used. Because *Eager v State Hwy Comm'r*, 376 Mich 148 (1965), was wrongly decided, prospectively, from the date of this opinion, it should be overruled.

Justice WEAVER, joined by Justice BRICKLEY, dissenting, stated that the majority's interpretation of the highway-by-user statute is unconstitutional because it amounts to a seizure of property without just compensation or actual use. The highway-by-user statute is constitutional only when interpreted to afford the public a highway as wide as has been actually used.

The highway-by-user statute should be read as limiting the presumption of width to the extent actually used. Implied

dedications involve a fictional offer inferred from the property owner's acquiescence to public use, and the acceptance of the fictional offer by actual use and maintenance of the dedication by the appropriate public authority. Failure by the public to use the full four rods anticipated by the highway-by-user statute simply results in the public's acquiring less than four rods. The majority's assumption that the Legislature can draft a statute that destroys a fee simple interest in real property without compensation or proof of actual use is no less than a sanctioning of the unconstitutional seizure of private property. However, regardless of the common-law theory being modified by statute, the Legislature is bound by the federal and state constitutions. Although the majority relies on *Bumpus v Miller*, 4 Mich 159 (1856), to support its holding, it ignores a long series of opinions holding that highways established under the highway-by-user statute are not presumptively four-rods wide, but are only as wide as the extent of use.

It is fundamentally contrary to taking jurisprudence to justify the seizure of property by balancing the value of a fee simple interest against its potential value and use to the public. Because the majority's interpretation of the highway-by-user statute exacts a permanent easement from all property owners whose land abuts public highways established by user beyond that actually used, it is unconstitutional. Further, because the majority's interpretation of the highway-by-user statute effects a taking of property, notice must be given beyond what can be attributed to the mere enactment of the .statute. The majority's interpretation of the highway-by-user statute ignores reason and fairness. It is fundamentally unfair

to take a modern property owner's land because of a predecessor's failure to act, when it would have reasonably been understood by the predecessor, given the decisions of the Supreme Court, that no action was necessary to limit the width of a public highway to the extent actually used.

Roberts, Betz & Bloss, P.C. (by Marshall W. Grate), for the plaintiff-appellant.

Rhoades, McKee, Boer, Goodrich & Titta (by Arthur C. Spalding and Molly M. McNamara) for the defendants-appellees.

Amici Curiae:

Pratt & Frank, P.C. (by Donald C. Frank), for Kathy S. Barrier and Betty Bergeon.

Frank J. Keller, Attorney General, Thomas L. Casey, Solicitor General, and Patrick F Isom, Assistant Attorney General, for Department of Transportation.

Hackett, Maxwell & Phillips (by Dawn L. Phillips-Hertz and Lisa Rycus Mikalonis) for Michigan Press Association.

Larry A. Salstrom for Ingham County Board of County Road Commissioners.

M. Carol Bambery for Michigan United Conservation Clubs.

Fraser, Trebilcock, Davis & Foster, P.C. (by Michael C. Levine and Christina T. Henriques), for County Road Association of Michigan, Michigan Municipal League and Michigan Townships Association.

Loomis, Ewert, Parsley, Davis & Gotting, P.C. (by Harvey J. Messing and Gary L. Field), for Michigan Electric and Gas Association, Michigan Municipal Electric Association, Michigan Electric Cooperative Association, Telecommunications Association of Michigan, Ameritech Michigan, GTE North Incorporated, Detroit Edison Company, Michigan Consolidated Gas Company, and Consumers Energy Company.

Robert C. Walter, Assistant Corporation Counsel, for City of Detroit.

Thomas J. O'Toole for Muskegon County Road Commission.

CAVANAGH, J. In this case we granted leave to appeal to determine whether a highway created by use under the highway-by-user statute[1] is limited to the area of actual public use, or to the statutory four-rod width. If the latter, we then must determine whether the four-rod-wide rebuttable presumption is constitutional under the Michigan and United States Constitutions. In accordance with United States Supreme Court case law, we hold that the state has the authority to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period. To that end, we hold that the highway-by-user statute is constitutional and does not create a "taking" of property without just compensation.

---

[1] MCL 721.20; MSA 9.21.

I

The plaintiff, city of Kentwood, and defendant, Fernando Cioni and Charles and Luciana Waddell stipulated the following facts.

The city of Kentwood is a Michigan municipal corporation located in Kent County, Michigan. On May 20, 1994, the city brought a condemnation action pursuant to MCL 213.51 *et seq.*; MSA 8.265(1) *et seq.*, the Uniform Condemnation Procedures Act. The city, by resolution dated March 21, 1994, determined that it was necessary for the health, safety, and welfare of the public to acquire certain property interests for the purpose of widening and improving 52nd Street in the city. On May 20, 1994, the city recorded a declaration of taking with the Kent County Register of Deeds.

One of the parcels affected by the condemnation action is the property purportedly owned by the defendants. The city took from the defendants' parcel a total of 64,610 square feet of land area. The city also acquired an additional thirty-foot wide temporary grading permit.

As of May 20, 1994, 52nd Street was improved on the south side of the centerline with a ten-foot wide asphalt street, together with an additional six-foot wide shoulder and ditch area. The property owners concede that the sixteen-foot area had become a highway by user as of May 20.[2] The city

---

[2] In the affidavit of Carey Sommerdyke, defendants admit that the original farmhouse was built in 1885 at 3461 52nd Street. Thus, 52nd Street, having existed at least since 1885, has been a

claimed, and the property owners denied, that the entire area within thirty-three feet of the centerline of 52nd Street had become a highway by user as of May 20. The land between sixteen and thirty-three feet from the centerline of 52nd Street is the area in dispute.

The property owners mowed the grass and planted trees within the area in dispute. However, the property owners did not maintain any structure within the disputed area. On October 25, 1979, Michigan Consolidated Gas Company applied for a highway permit from the Kent County Road Commission to lay a two-inch gas line within the area in dispute. The application was approved by the road commission on November 5, 1979. On November 9, 1983, the gas company applied for an additional permit to lay a 1-1/4 inch gas line along the defendants' property. This application was also approved by the road commission. These gas lines were installed twenty-six feet from the centerline of 52nd Street. On May 20, 1982, Wolverine Paving, Inc., applied for a highway permit to install a residential driveway approach at the defendants' property.

During all relevant times, 52nd Street was under the sole jurisdiction of the city, but the road commission acted as the city's agent for permit applications and maintenance purposes. The property owners have not pursued any action against the road commission or Michigan Consolidated Gas Company for trespass or damages relating to the installation of the gas lines.

---

highway by user for over one hundred years.

On August 1, 1995, the city filed a motion for summary disposition, arguing that its highway right of way was presumptively thirty-three feet wide on either side of the centerline of 52nd Street. On August 7, 1995, the property owners filed a cross-motion in limine, asserting that a highway created by the highway-by-user statute is limited to the area of actual use. The trial court so held.

As a result of the trial court's ruling, the parties waived their rights to a jury. trial and submitted the case for decision on the stipulated facts. The trial court issued its written opinion on March 20, 1997, holding that a highway created in accordance with the highway-by-user statute applies only to the extent of actual use. Rejecting the city's argument that the underground gas line expanded the width of the highway, the trial court found in favor of the property owners and awarded $26,210 as just compensation for the land taken.

The city appealed to the Court of Appeals and in this Court. This Court granted leave to appeal, bypassing the Court of Appeals, to address this jurisprudentially significant, issue.

II

First, we must determine whether the state has the authority to create a statute that conditions the retention of a property right on performance of conditions that indicate a present intention to retain the property interest. If the state has the authority to do so, we next must determine whether the highway-by-user statute authorizes an unconstitutional "taking" of property without just compensation.

Appellees do not contest the establishment of a highway by use; rather, they contest the extent of the road to which the state is entitled. They claim that the state is entitled only to that portion of the highway actually used by the public. While the statute gives the state the right to assert ownership over the full four-rod width of a road, the appellees contend that to the extent it gives the state the right to property not actually used by the public, the statute creates an unconstitutional "taking" of property under the United States and Michigan Constitutions. Therefore, appellees assert, the state must pay just compensation for the portion of the road the state wishes to widen. We disagree.

Before we address appellees' arguments about the constitutionality of the highway-by-user statute, it is appropriate to consider whether the state has the power to provide that property rights of this character shall be extinguished if their owners do not assert a right to them by performing reasonable conditions within the ten-year period required by the statute. In accordance with case law from the United States Supreme Court, we hold that a state may condition the retention of a property right on performance of an affirmative action within a reasonable statutory period.

The highway-by-user statute, MCL 221.20; MSA 9.21 provides:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which

> have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width [sixty-six feet], and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods [thirty-three feet] in width on each side of such lines.

The first version of the highway-by-user statute was enacted in 1838, the year after Michigan became a state. 1838 RS, tit 6, ch 4, § 42. While the statutory period for retention of the property right has changed over the years, the statute has remained substantially similar to the one enacted as first written.

At oral argument, the appellees asserted that because property is a fundamental right, the state cannot put the burden on the landowner to do an affirmative act in order to retain the property right. This assertion has been rejected by the United States Supreme Court.

In *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972), the United States Supreme Court stated:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source

> such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Through our highway-by-user statute, Michigan has declared that appellees' property interest is of less than absolute duration and that retention of that interest is conditioned on the performance of certain actions within the ten-year period. Like the United States Supreme Court,

> [w]e have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.
>
> From an early time, this Court has recognized that States have the power to permit unused . . . interests in property to revert to another after the passage of time. In *Hawkins v Barney's Lessee,* [30 US (5 Pet)] 457; 8 L Ed 190 [1831], the Court . . . stated: . . . "What right has any one to complain, when a reasonable time has been given to him, if he has not been vigilant in asserting his rights?" *Id.* at 466. *[Texaco v Short,* 454 US 516, 526; 102 S Ct 781; 70 L Ed 2d 738 (1982).][3]

---

[3] We note that *Texaco* dealt with the lapse of mineral rights as opposed to the lapse of surface property rights. However, our analysis is the same under either a "surface rights" case or a "subsurface rights" case because mineral rights "are entitled to the

In the early settlement of this country, a person who received a grant of property and failed within five. years to seat and' improve it was held to have abandoned it. *Id.* at 527, n 19. Later, the United States Supreme Court upheld a Pennsylvania statute that provided for the extinguishment of a reserved interest in ground rent if the owner failed to collect rent or did not make a demand for rent within twenty-one years. Although the effect of the Pennsylvania statute was to extinguish a fee-simple estate of permanent duration, the Court held that the statute was valid. *Id.* at 527, citing *Wilson v Iseminger,* 185 US 55; 22 S Ct 573; 46 L Ed 804 (1902). As the *Texaco* Court noted, "[i]n these early cases, the Court often emphasized that the statutory 'extinguishment' properly could be viewed as the withdrawal of a remedy rather than the destruction of a right." *Id.* at 528.

The highway-by-user statute does not treat the property in question as abandoned; however, it does treat the property as impliedly dedicated to the state for public use. While we note that abandonment and dedication are two separate theories under which a person can relinquish a property right, we believe that the analysis is the same under either. The important concept from the *Texaco* decision is that

> [i]n each case, the Court upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the

---

same protection as are fee simple titles." *Id.* at 519, n 5 (citations omitted).

> property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to . . . lapse. [*Id.* at 529.]

Now that we have established that our Legislature has the power to condition retention of property fights on certain affirmative actions, we must proceed to the next step, whether the duty imposed is reasonable.

> Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.
>
> "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." [*United States v Locke,* 471 US 84, 104; 105 S Ct 1785; 85 L Ed 2d 64 (1985), citing *Usery v Turner Elkhorn Mining Co,* 428 US 1, 16; 96 S Ct 2882; 49 L Ed 2d 752 (1976) (citations omitted).]

We believe that it is clear that the state has not exercised its power in an arbitrary manner. The statute provides that all roads created by use shall become a public highway of four-rods width if they have been used as a public highway for ten years or more. Our Court has interpreted this statute to establish a dedication of land for public use. A

common-law dedication is an intention on the part of the owner to dedicate the land for public use, which is accepted by the public. *Choals v Plummer,* 353 Mich 64, 70; 90 NW2d 851 (1958).

Highways by user are based on an implied dedication by the landowner. *Kruger v Le Blanc,* 70 Mich 76; 37 NW 880 (1888). Under the highway-by-user statute, a particular period, in this case ten years, creates a presumption of dedication to the public. One similarity between a common-law dedication and a dedication by user is that a presumption of dedication can be rebutted by evidence showing that the property owner intended to give the public less than the full width of the road. However, under common law, this determination was often difficult to make because there was no prescribed time frame in which to measure the extent of the dedication.

Although our courts have made a distinction between common-law and dedication implied by statute, we have not clearly explained the technical distinction. A clear distinction has been articulated by English case law:

> At common law there is no fixed minimum period which must be proved in order to justify an inference of dedication and no fixed maximum period which compels such an interference. It all depends on the facts of the case. Prima facie the more intensive and open the user and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication at common law.

* * *

> The common law required not only that the claimant to the right should show that the landowner had evinced an intention to dedicate, he had to show actual dedication; and it was precisely because such an event was usually fictitious or imaginary that the common law was unsatisfactory. [*Nicholson v Secretary of State for the Environment,* unreported QB Div'l Ct opinion issued March 22, 1996 (C0/2205/95).]

In Michigan, the highway-by-user statute modified the common law. Statutes like this eliminated the need to prove a fictional event. Michigan's statute refines this concept by holding that a dedication is established during the ten-year period of limitation. It is during that ten-year period that a property owner can present evidence that rebuts the existence and extent of a public highway. The statute creates consistency in the theory of implied dedication through a prescribed period as well as a specific, width of four rods. This statutory presumption allows for the dedication of the entire four-rod width unless the evidence rebuts the presumption.

In the past, our case law has determined what evidence is sufficient to rebut the existence and extent of a public highway. In *Ellsworth v Grand Rapids,* 27 Mich 249 (1873), our Court stated:

> The statute, in all such cases, is a fair notice to the owner that if he means to dispute the rightfulness of the public user, he must assert his right within the

> prescribed period *in some way calculated to interfere with, disturb or interrupt such use by the public, or by the institution of a suit for the judicial determination of the right.* [*Id.* at 256 (emphasis added).][4]

We feel the statutory period of ten years provides ample opportunity for a property owner to rebut the presumption. Furthermore, we find reasonable the requirement that a property owner must assert the right within the prescribed period in a manner calculated to interfere with, disturb, or interrupt the use by the public, or by instituting an action in court. We do not find the requirements necessary to rebut the presumption to be arbitrary. "The State surely has the power to condition the. ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State." *Texaco,* 454 US 529-530.[5]

Therefore, like the Court in *Texaco,* we conclude that

---

[4] Because this case does not deal with the issue whether the property owner actually rebutted the statutory presumption of dedication within ten years after the highway by use was created, we will not address the long line of cases that address the conditions that must be established in order to rebut the presumption.

[5] As noted in *Texaco*, "'[W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.'" *Id.* at 530, n 23, quoting *Miller v Schoene,* 276 US 272, 279-280; 48 S Ct 246; 72 L Ed 568 (1928).

the state may condition the permanent retention of a property right on performance of reasonable conditions that indicate a present intention to retain the property interest. We find that, by treating property that has not been reserved for private use for ten years or longer as dedicated to the public for use as a highway, the Michigan statute is a reasonable exercise of police power.

III

We now examine the substantive effect of the highway-by-user statute to determine whether the Legislature nonetheless is barred from enacting it because it works an impermissible intrusion on constitutionally protected rights. Appellee contends that the highway-by-user statute takes private, property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth amendment prohibition applies against the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc v Beckwith,* 449 US 155, 160; 101 S Ct 446;

66 L Ed 2d 358 (1980). Michigan's Constitution is substantially similar to the Taking Clause of the United States Constitution. *Van Slooten, v Larsen,* 410 Mich 21, 41; 299 NW2d 704 (1980). It provides:

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record. [Const 1963, art 10, § 2.]

As early as 1856, this Court addressed the constitutional issues raised by the application of the highway-by-user statute. Specifically, we rejected the same argument appellees currently make. In *Bumpus v Miller,* 4 Mich 159 (1856), the plaintiff asserted that his property could not be taken for public purposes, except the necessity for using it. This Court rejected the plaintiff's arguments stating that

> the constitution, however, in no way or manner touches or affects the case now under consideration. It applies to cases where private property is taken for public use without the consent of the owner, and does not apply to cases where the owner actually gives or dedicates his property to the public for their use, or where, from his long acquiescence in the use of it by the public, a donation or dedication is presumed by law, as in the case before us. The plaintiff, or those under whom he claims, has suffered the public to use the road as a highway without objection, for more than twenty years. From this fact, the law presumes a donation of it to the public, or a dedication of it to the

public use. [*Id.* at 163-164.]

See also *Fuller v Grand Rapids,* 105 Mich 529; 63 NW 530 (1895). We now reaffirm our prior holding. The statute itself creates the basis for the implication that, under the circumstances defined in the statute, the owner implied a dedication of property four rods in width for use as a public road.

The dissent claims that this interpretation of *Bumpus* was "expressly found unconstitutional" by subsequent decisions of this Court including *Eager v State Hwy Comm'r,* 376 Mich 148; 136 NW2d 16 (1965), and *Smith v State Hwy Comm'r,* 227 Mich 280, 283-286; 198 NW 936 (1924). *Post* at ___. However, a close reading of these cases shows that *Bumpus* has not been held unconstitutional. In *Eager,* the land in dispute was land that had been continuously used and maintained by the property owner for more than fifty years, first as a private parking lot for a hotel, and later as a location for gasoline pumps for a gas station. The defendants and their predecessors in title testified that the disputed strip of land had been used as a private parking place and a means of ingress and egress from their places of business, and it was used exclusively by the defendants and their predecessors in title. *Id.* at 152. *Eager* properly held that the statutory presumption did not apply to the facts of that case. Moreover, the Court recognized and upheld the statutory presumption stating that if a property owner "means to dispute the rightfulness of the public user, he must assert his right within the statutory period by physical action or suit." *Eager,* 376 Mich 154, citing *Ellsworth v Grand Rapids, supra.*

We recognize that after establishing that the presumption of dedication had been rebutted, the Court in *Eager* made the assertion that "privately owned land cannot become public road by user beyond the portion used as such merely by the . . . statutory pronouncement to that effect." *Id.* We believe that this sentence, when read in the context of the whole opinion, supports our proposition that *where there is evidence that the presumption has been rebutted within the statutory period,* privately owned land cannot become a public road merely because the statute presumes the road to be four rods wide. To the extent that the dissent claims this statement supports the proposition that a public road is *always* only as wide as actual use, we disagree. If we read *Eager* to support the proposition of the dissent, the Court's alleged pronouncement that a public road is *always* only as wide as actual use would be dicta because, as noted previously, the presumption was effectively rebutted in that case. To be sure, we now clarify our holding in *Eager,* and limit it to cases where the presumption has been rebutted.[6] The public road is

---

[6] In a 1986 decision, this Court in *Eyde Bros Development Co v Eaton Co Drain Comm'r,* 427 Mich 271; 395 NW2d 297 (1986), reaffirmed our holding in *Bumpus.* We also stated that "the width of the easement is not confined to the paved surface . . . but includes the entire four rods or sixty-six feet." We continued:

To rebut the presumption of four rods width, a fee owner must prove that the width of the easement was "expressly or impliedly restricted." *Bumpus, supra* at 164. Cases in which the statutory presumption has been rebutted effectively include those in which the abutting property owner has continuously maintained some structure or activity tending to give notice of possession or

only as wide as actual use where the plaintiff presents evidence that the presumption of dedication .has been rebutted within the statutory period of repose. If the presumption is not rebutted within the statutory period, the road is deemed dedicated to the full extent of the four-rod width.

Indeed, none of the cases cited in *Eager* or the dissent negate the statutory presumption of sixty-six feet. For example, *Smith, supra,* cited in *Eager,* recognized the statutory presumption of sixty-six feet when it stated:

> But if we . . . accept all that is claimed for *Bumpus v Miller, supra, and Kruger v LeBlanc, supra*, and hold that an offer to dedicate presumes a four-rod strip, still the presumption is a rebuttable one, and all the facts and circumstances in the instant case rebut it. [*Smith,* 227 Mich 287.]

Thus, contrary to the claims of the dissent, *Bumpus* has never been "expressly found unconstitutional" by this Court. Indeed, we agree with our prior decisions in *Eager* and *Smith,* that where there is evidence that the presumption was rebutted within the statutory period, or where there is no road created by use over a person's property affording him the

---

control of the disputed property. See *Eager v State Hwy Comm'r,* 376 Mich 148; 136 NW2d 16 (1965) (private parking place); *Coleman v Flint & Pere Marquette R Co, 64* Mich 160; 31 NW 47 (1887) (fence and cultivated land); *Scheimer v Price,* 65 Mich 638; 32 NW 873 (1887) (fence). . . . [*Id.* at 298-299.]

Therefore, we believe our interpretation of *Eager is* consistent with *Eyde Bros.* and the result in this case should not be prospective only.

opportunity to rebut the presumption, it would be unconstitutional to "take" his property without due compensation.

The dissent also claims that we "render[] meaningless" MCL 221.22; MSA 9.23 (establishing that public highways may be discontinued), as well as *Lyle v Lesia,* 64 Mich 16; 31 NW 23 (1887), and *Gregory v Knight,* 50 Mich. 61, 64; 14 NW 700 (1883). *Post* at ____. However, the dissent is incorrect. It claims that "a portion" of the highway dedicated to the public should be deemed discontinued under MCL 221.22; MSA 9.23, which reads in full:

> Every public highway already laid out, or hereafter to be laid out, *no part* of which shall have been opened and worked within 4 years after the time of its being so laid out, shall cease to be a road for any purpose whatever. [Emphasis added.]

Therefore, the statute expressly negates the dissent's proposition that nonuse of a portion of the dedicated land means that the unused portion is "discontinued" and somehow escheats back to the original property owner. In fact, by implication, it supports the conclusion that unless the highway is abandoned in its entirety, the dedicated land remains owned by the public to the full extent of the four-rod width.

Furthermore, the dissent is incorrect in asserting that *Lyle* and *Gregory* require a different result. In *Lyle,* an *old* road was abandoned in favor of the creation of a new road. There was *no* travel over the old road for over twelve years, and six years after the new road was created, the property owner erected a fence where the old road had been. The

Court held that the state could not reopen the old road that had been abandoned by the public for over twelve years in favor of the new road.

In *Gregory,* the Court held that the road was "partially discontinued" because the adjacent property owner had placed a "rail fence, stone row, rail pipes, hay barn and sheds" on the portion of the highway the highway commissioner sought to clear. *Gregory,* 50 Mich 62. The Court held that because a highway may be wholly discontinued by user, it may also be partially discontinued. However, the significant factor in determining whether a portion of the highway had been partially discontinued was that the property owner had effectively rebutted the presumption of dedication by erecting the fence, barn, and sheds on the property in question. *Id.* at 64.

Appellees acknowledge *Bumpus* and the above-cited case law; however, they assert that our decisions have incorrectly held that the statute does not affect the Taking Clause of the constitution. In support of their, position, the appellees cite *Nollan v California Coastal Comm,* 483 US 825; 107 S Ct 3141; 97 L Ed 2d 677 (1987), for the proposition that the statute authorizes an unconstitutional taking of property without just compensation. We disagree with appellees' contention that *Nollan* requires a contrary result. *Nollan* states in relevant part:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase

> public access to the beach . . . we have no doubt there would have been a taking.
>
> * * *
>
> We have repeatedly held that, as to *property reserved by its owner for private use,* "the right to exclude [others is] 'one of the most essential sticks in the bundle of fights that are commonly characterized as property.' " [*Id.* at 831 (citations omitted, emphasis added).]

The one notable difference between *Nollan* and this case is that Michigan has not *required the* original property owners to give the property to the state. Instead, the Michigan statute allows the landowner to assert the right to the property within ten years after the creation of the road as a public road by use. If ten years pass without a continuous assertion of right by the property owners, the law presumes that the owner intended to dedicate the entire four-rod width of the road. It is only after the property owners have failed to act to preserve their fight to the property that the property is deemed dedicated to the state. Indeed, *Nollan* supports this. Where the "property [is] reserved by its owner for private use" the state may not take the property without just compensation. However, in this case, the property owner did not reserve the property for private use because the property owner, after reasonable notice, did not properly assert his right to the property within the ten-year period.[7] Therefore, the Taking

---

[7] One of the concerns raised at oral argument is that there is no ascertainable date regarding when the period runs. To the extent

Clauses of the United States and Michigan Constitutions are not implicated. This is so because, after dedication, "the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property--and not the action of the State--that causes the lapse of the property right; there is no 'taking' that requires compensation." *Texaco,* 454 US 530.[8]

---

that the determination is placed on the current property owners, we agree. Now, over one hundred years after the highway was originally created, we agree that it would be difficult to determine the date the highway was created. See affidavit of Carey Sommerdyke establishing that the original farmhouse on the property in question was built in 1885 at 3461 52nd Street. However, it is not the current property owners who must ascertain the date the highway was created, because defendants concede the road in question was created more than ten years before appellees acquired the property. It is the person who owned the property when the highway was originally created by use who must assert his right to the property within the statutory period. We believe that a property owner will know when a road is created across his property to a relative degree of certainty. If he does nothing within the statutory period, the statute presumes that he has dedicated the entire four-rod width to the public. We find that the original property owner would be able, with reasonable certainly, to ascertain the date the road was created by use and, thus, would know when the ten-year period began to run.

[8] We reject appellees' argument that *Texaco* is distinguishable because the property lapsed to the successor owner, whereas in this case the property lapses to the state. This is a distinction without a difference. The crucial inquiry is whether the state has the authority at all to condition the retention of a property fight on certain affirmative acts. Once it is established that the state has this

Indeed, this premise shows the fundamental flaw in the dissent's analysis. The dissent claims that the original and subsequent property owners retain a fee simple interest in the land because a portion of the dedicated land was unused. However, as noted previously, once a dedication has occurred and there is no evidence that the presumption of dedication has been rebutted, the original property owners no longer own the land dedicated to the public. Therefore, it is incorrect to claim that they retain a fee simple interest in the land. Where the property owner retains no interest in the land, it would be impossible for there to be a "taking." See, e.g., *Cincinnati v White,* 31 US (6 Pet) 431, 440; 8 L Ed 452 (1832) (the original and subsequent property owners, after dedication, have no interest in the dedicated land but the "mere naked fee").

IV

The appellees also contend that the statutory presumption does not provide due process of law. However, this argument was also rejected by the *Texaco* Court. There, the Court stated that, generally, a legislature need only enact and publish a law and afford citizens a reasonable opportunity to familiarize themselves with the terms of a statute to advise its citizens of the lapse of a property right. *Id.* at 530. "[N]o specific notice need be given to an impending lapse." *Id.* at 533. In the instant case, the state of Michigan has enacted a rule of law uniformly affecting all citizens that establishes that a property interest will lapse through the inaction of its

---

authority, it does not matter to whom the property lapses.

owner. In this case, the law was enacted in 1838. Therefore, the current property owners, if they are to complain at all, must complain to the original property owners who dedicated their land for public use.

To the extent that the current property owners claim a right to the disputed property, we note that the property in question was never owned by them. They present no evidence that the original property owners rebutted the presumption of dedication within the statutory ten-year period. Their only evidence rebutting the presumption dates from 1955 to the present. However, the original farmhouse was built at 3461 52nd Street in 1885.[9] Therefore, the property became property of the state when the road was created by use, and it was deemed dedicated to the state to the full extent of the four-rod width because there was no contrary action taken within the statutory period.[10]

---

[9] The dissent argues that the burden of rebuttal is unreasonable because of ambiguities in the statute, the period for rebuttal, and the passage of over 150 years since the road was created. However, the cases on which the dissent relies to assert the unconstitutionality of the statute all, dealt with defendants who were able to present evidence that would rebut the presumption or make a reasonable argument to rebut the presumption, thus proving that the burden is not so unreasonable that it was unworkable in the past. Indeed, it would be difficult to argue that affording a property owner *ten years* to assert his right is somehow "unreasonable." Regardless, there is simply no evidence in this case of rebuttal that dates further back than 1955.

[10] The dissent also claims that the statute impermissibly places the burden of proving that predecessors in title acted within the

Finally, it is ironic that the dissent so vigorously challenges our interpretation of the highway-by-user statute where it has previously supported the position of the majority by signing a unanimous Court of Appeals opinion. In *Kent Co Rd Comm v Hunting*, 170 Mich App 222; 428 NW2d 353 (1988), a unanimous Court of Appeals panel, including Justice WEAVER, stated:

> The elements of a highway by user have been expanded to require evidence of a defined line of travel with definite boundaries, used and worked upon by public authorities, traveled upon by the public for ten consecutive, years without interruption, in an open, notorious and exclusive manner. . . . If the elements are established, the statute operates to raise the rebuttable presumption that the road is four rods, or sixty-six feet wide. *Eyde Bros Development Co v*

---

statutory, period in order to rebut the dedication. However, this argument, too, must fail. At common law, the legal burden of proving dedication by user rests on the user. However, where dedication is presumed, as is the case where a dedication is implied by statute, the burden shifts to the property owner to rebut the presumption of dedication during the statutory period. *Nicholson, supra.* If the property owner fails to rebut the presumption, the road is deemed dedicated to the full extent of the four-rod width. Because the burden is placed on the original property owner to rebut the presumption, the burden would remain with subsequent property owners to provide evidence that the presumption was rebutted. It would be illogical to shift the burden back to the government once the public is deemed to be the legal owner of the property.

> *Eaton Co Drain Comm'r,* 427 Mich 271, 298-299; 398 NW2d 297 (1986), reh den 428 Mich 1206 (1987).
>
> However, this presumption may be rebutted if the landowner offers any evidence, such as the existence of a structure within the four-rod statutory width, or any other evidence, that the owner retained control of an area within the statutory width. . . . Once the presumption is rebutted, the highway cannot be wider than the zone of actual use which meets the highway by user test outlined above. *Eager, supra,* pp 154-155.
>
> * * *
>
> In our case, the property owners along [the highway created by use] must establish that they, or their predecessors in interest, took sufficient action during the running of the statutory ten-year period to give notice of their intention to maintain possession and control over the disputed area. [*Id.* at 231-232.]

We find that the challenges made by the dissent in this case were effectively rebutted by the Court of Appeals decision. Furthermore, this interpretation squares directly with our majority opinion.

For these reasons, we reverse the decision of the circuit court.

MALLET, C.J., and BOYLE and KELLY, JJ., concurred with CAVANAGH, J.

TAYLOR, J. *(concurring in part and dissenting in part).* I agree with the majority that a highway created by user pursuant to MCL 221.20; MSA 9.21 is presumptively four rods (sixty-six feet) wide. However, I disagree with the majority's analysis of the issue in terms of implied, dedication. I believe the more apt analysis recognizes that the highway-by-user statute is simply a legislative modification of the common law of prescriptive easement. However, I also disagree with the majority's treatment of *Eager v State Hwy Comm'r,* 376 Mich 148; 136 NW2d 16 (1965). I do not think that *Eager* can be harmonized with today's holding. Therefore, I would explicitly overrule *Eager* and, in light of the reliance the people of this state must be able to place in the decisions of this Court, apply my ruling prospectively. Consequently, plaintiffs, who acquired their parcel of land in 1973, should be compensated for the strip of land forming the basis of the instant controversy.

At issue here is a strip of land lying adjacent to an improved road that was created by user. That is to say, the road was never formally dedicated to the public as such, but instead was created when the public used this portion of land as a road over an extended period. The city of Kentwood has endeavored to widen the road, and in doing so found it necessary to take a portion of defendants' land for that purpose. However, in determining the amount of compensation owed defendants because of the taking, plaintiff has claimed that it need not pay compensation for any portion of the existing highway and that its existing right of way is four rods wide, despite the fact that the improved portion of the road did not extend that far onto defendant's land.

Defendants, in turn, argue that they must be compensated for all the land taken that lies outside the existing improved portion of the road because a highway by user is only as wide as actually used, not four rods. The trial court agreed with defendants and ordered that they be compensated for all land taken that lies outside the improved portion of the road. This Court granted leave to appeal, bypassing the Court of Appeals, in order to address the question presented.

As noted initially, I believe the highway-by-user statute is simply a legislative modification of the common law of prescriptive easement. An easement, put simply, is the right, to use the land of someone else. *Morrill v Mackman,* 24 Mich 279, 297 (1872). Our common law recognizes the creation of easements through prescription. Prescriptive easements are created when a person uses the property of another for a particular purpose, but does not possess the land. "Title or rights in lands founded on prescription originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner, by his acquiescence, has granted the land, or interest to the land, so held adversely." *Turner v Hart,* 71 Mich 128, 138; 38 NW 890 (1888). At common law, the party claiming the easement must have used it for fifteen years. *Id.*

With this understanding of the common law of prescriptive easement, I turn to the statute in question. As noted by the majority, the Legislature first addressed highways created by use in 1838 RS, tit 6, ch 4, § 42. Enacted the year after Michigan became a state, it provided

that "all roads not recorded, which have been, or shall have been used as public highways twenty years or more, shall be deemed public highways .... " Section 43 in turn required that all roads that had been used as public highways for at least twenty years be opened to at least two rods in width.

Before the enactment of this statute, in the early days of our state, many roads were informally established. Under the common law, such use would appear to have created an easement across the land because it was actual, adverse, peaceable, open, and uninterrupted. However, at common law an easement in gross normally flowed to a specific individual and was limited in scope to actual use. In moving forward with the business of governing a new state, the Legislature sought to regularize the system of public highways. Consequently, it determined that such informally created roads should attain a legally recognized status and formally become public highways. Modifying the common law of easement, clearly within the Legislature's prerogative, Const 1963, art 3, § 7; *Placek v Sterling Heights*, 405 Mich 638, 657; 275 NW2d 511 (1979), the Legislature vested the rights to use these roads in the public at large and determined that the roads must have been used for twenty, rather than fifteen years, before they would attain such status. Additionally, while common-law easements were limited to the scope of actual use, the Legislature determined that public highways would be at least two rods, or thirty-three feet, wide. 1838 RS, tit 6, ch 4, § 43.

In subsequent years the Legislature modified the statutes related to highway by user, changing the period of

prescription from twenty years to ten and also expanding the width of the easement created from two rods to four. Nevertheless, the basic statutory scheme remains unchanged, Consequently, § 20, the present incarnation of the highway-by-user statute, provides in part:

> [A]ll roads that shall have been used as such for 10 years or more whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that axe or that may become such by time and use, shall be 4 rods in width . . . .

This Court has recognized that the right of way obtained pursuant to the highway-by-user statute is an easement and that the abutting landowner retains the fee simple interest. *Eyde Bros Development Co v Eaton Co Drain Comm'r,* 427 Mich 271, 282; 398 NW2d 297 (1986); cf. *Grandville v Jenison,* 84 Mich 54, 65; 47 NW 600 (1890); *Wanzer v Blanchard,* 3 Mich 11, 16 (1853). Because the nature of the interest obtained by the public is an easement that was created essentially by prescription, in order to remove any confusion in the future in this regard, I would clarify the analysis accordingly. Moreover, acknowledging that the state has only obtained an easement answers Justice WEAVER'S concern that the highway-by-user statute "destroys a fee simple interest in real property without

compensation .... " *Post* at __. This is simply not the case because the fee is retained by the abutting landowner. Only an easement is created by the highway-by-user statute.

My dissenting colleagues conclude that granting the state a right of way that exceeds the amount actually used effects a taking of the abutting landowner's property without just compensation, in violation of US Const, Am V and Const 1963, art 10, § 2. I disagree. First, as just noted, the landowner retains his fee simple interest. Second, because the right of way, as a prescriptive easement, would not have attained status as a highway by user but for the abutting landowner's acquiescence in the use of a portion of his land as a highway, the landowner's acquiescence precludes any finding of a taking. Third, we must acknowledge what I believe to be the controlling effect of the United States Supreme Court's jurisprudence in this area.

My dissenting colleagues assert that the landowner did not acquiesce to anything more than what was actually used, as would be the case if one were addressing a common-law prescriptive easement. However, this view ignores that the highway-by-user statute puts the landowner on notice that if he allows a highway to be created by use, the highway will be the statutory width, absent some action by the landowner to eliminate or limit the use of his land that operates, over the prescriptive period, to create the highway by user.

My colleagues argue that statutory notice alone cannot be sufficient to apprise the landowner that acquiescence in a road ten feet wide is actually acquiescence in a road four rods wide. I disagree. As the majority notes, both this Court and

the United States Supreme Court have found that the titleholder of mineral rights may lose those rights for failure to specifically claim them, even where the only notice of the need to file the statutory claim is in the statute itself. As noted in *Texaco v Short,* 454 US 516, 532; 102 S Ct 781; 70 L Ed 2d 738 (1982):

> It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.

See also *North Laramie Land Co v Hoffman,* 268 US 276, 283; 45 S Ct .491; 69 L Ed 953 (1925); *Van Slooten v Larsen,* 410 Mich 21, 52-55; 299 NW2d 704 (1980); *Curley v Beryllium Development Corp,* 281 Mich 554, 556; 275 NW 246 (1937) ("It is a maxim of the law that ignorance excuses no one'").[1]

---

[1] The dissenters attempt to read *Texaco and Van Slooten, supra,* to say that the statute here at issue, which gives ten years before the abandonment necessary to establish an easement occurs, runs afoul of a constitutional requirement in *Texaco and Van Slooten* to the effect that at least twenty years must be given to the affected landowner to act to preserve his interest. This is incorrect, as *Texaco and Van Slooten* not only do not 'establish Such a twenty-year floor, but in fact, in finding the statutes constitutional approved a two-year grace period in *Texaco* and a three-year grace period in *Van Slooten in* which owners of interests created before the acts were passed had to record a claim of interest to preserve their mineral rights. *Texaco, supra,* 518-519; *Van Slooten, supra,* 410 Mich 38. The position of the *Van Slooten* majority was that such notice rules are tested not for some arbitrary time

That the effectiveness of the statutory notice was sufficient in this case, regarding property interests, is buttressed by the fact that the presumption of knowledge of the law applies equally to the situation in which a person's liberty, rather than property, interests are at stake, i.e., a situation historically subjected to more exacting judicial scrutiny. See *United States v Carlone Products,* 304 US 144, 153, n 4; 58 S Ct 778; 82 L Ed 1234 (1938). It is firmly grounded in our law that a person may have his liberty interests taken away, in the form of imprisonment, for violating a statute of which he did not have actual knowledge. "The general, rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in .the American legal system." *Cheek v United States,* 498 US 192, 199; 111 S Ct 604; 112 L Ed 2d 617 (1991); see also *People v Motor City Hosp & Surgical Supply, Inc,* 227 Mich App 209, 215; 575 NW2d 95 (1997). With this understanding it is clear that the enactment and publication of the highway-by-user statute is sufficient to put landowners on notice that acquiescence in the creation of a highway by user across their land will create a right of way four rods in width even if less is actually used.

Finally, in its discussion of *Nollan v California Coastal Comm,* 483 US 825; 107 S Ct 3141; 97 L Ed 2d 677 (1987), the dissent misapprehends that the easement there

---

requirement, but by a rule of reason. *Van Slooten, supra,* 410 iV[ich 49. Because two and three years were reasonable for the total divestment of an interest, certainly ten years to establish the less draconian circumstance of an abandonment must also be here.

under discussion was a specific easement over the Nollan's land. The California Coastal Commission had, as described colorfully by Justice Scalia, through an "out-and-out plan of extortion," conditioned the issuance of a building permit on the Nollan's granting of an easement over their land. *Id.*, 483 US 837. Unsurprisingly, this was held to be a taking. Our situation is not analogous, because the highway-by-user statute does not grant a specific easement, or indeed any easement at all, it merely alters the com-mon-law requirements for establishing an abandonment so that an easement may be held to be established. Thus, for example, what was at common law a fifteen-year use requirement was modified by the statute to ten years. This ability of the Legislature to modify the common law of easement is, as I understand the dissenters, not contested. What is contested, however, is the kind and scope of modification the Legislature can make. It is clear that the dissenting justices do not believe that the power to modify the common law can extend to the size of the easement granted. Were this question a matter of first impression, much could be said for their position. This question, however, is not one of uncertainty in our law, because it has been settled by the United States Supreme Court in *Texaco*. In that case, it was held that if notice is given by statute (as it was here) the affected interests in land (a fee interest in minerals in *Texaco*) can be shifted in this fashion. Our case is easier and falls within the *Texaco* rule. After all, rather than shifting a fee interest, the highway-by-user statute only claims a right to travel over the fee, which is, of course, a deprivation less than the total termination of a fee interest such as that seen in *Texaco*. We should follow

Texaco and find that there was no taking. It is our duty to follow the precedent of the United States Supreme Court on this constitutional matter, no matter what our own predilections, or give legally recognizable reasons for not doing so. Those reasons have, to my eye, not been presented.

Moreover, we must also recognize this Court's decision in *Eager v Mackie, supra* at 154, which held:

> We agree with the trial court that privately owned land cannot become public road by user beyond the portion used as such merely by the above noted statutory pronouncement to that effect. To so hold would be violative of Constitution of 1850, art 18, § 14, Constitution 1908, art 13, § 1, which prohibited taking by the public of private property except upon determination of necessity and just compensation "being first made and secured."

In light of this specific holding, the majority's attempt to harmonize *Eager* with today's holding simply is not possible.[2]

---

[2] I disagree with the majority's conclusion that the decision in *Eager* was based on the conclusion that the statutory presumption of width had been rebutted within the period of prescription. Close scrutiny reveals that the road at issue in *Eager* was created in 1872. The action (widening of the road) initiating the lawsuit occurred in 1958. *Id. The* opinion discusses testimony going "a half-century back" regarding the uses that had been made of the contested land. Because this evidence did not go back far enough to reach the period of prescription, logically this Court's holding could not have been based on the assumption that the statutory presumption had been rebutted during the period of prescription, which would have

If we are going to assume that people have read and know the law, one could only conclude that after *Eager* was decided everyone should have understood that a highway by user is only as wide as is actually used. Yet, I am convinced that *Eager* was wrongly decided. Consequently, because both my conclusion and the conclusion of the majority overrules this established precedent, we must consider the effect of our decision.

When *Eager* was decided, its effect was to make the portion of the highway-by-user statute that gave more land to the prescriptive user than was actually being used unconstitutional. This holding was retroactive under the doctrine that a statute, or portion of a statute, that is unconstitutional was always, from its inception, "inoperative as though it had never been passed." *Norton v Shelby Co,*

---

ended before the events that were adduced through testimony at trial. Moreover, since 1907, the Legislature has determined that an abutting landowner may not acquire any fights in a public highway through action that would, at common law, have constituted diverse possession. See *Crosby v Greenville,* 183 Mich 452, 459; 150 NW 246 (1914); MCL 247.190; MSA 9.270. Consequently, it must be that the Court's ruling was based on its conclusion that a highway by user is only as wide as actually used. This view of Eager is not idiosyncratic as the decisions of other jurisdictions as well as commentaries have understood this to be its holding. See *Barfnecht v Town Bd of Hollywood Corp, Carver Co, Minnesota*, 304 Minn 505; 232 NW2d 420 (1975); *Keidel v Rask,* 304 NW2d 402 (ND, 1981); 76 ALR2d 535; 76 ALR2d Later Case Service, § 4, p 191; 39 Am Jur 2d, Highways, Streets & Bridges, § 52, p 440; 2 Cameron, Michigan Real Property Law, Principles & Commentary (2d ed), § 25.9, p 1162.

Tennessee, 118 US 425, 442; 6 S Ct 1121; 30 L Ed 178 (1886); see also *Briggs v Campbell, Wyant & Cannon Foundry Co,* 379 Mich 160, 165; 150 NW2d 752 (1967). Accordingly, the nonused portion of the four rods was never in any fashion subject to any Claim of prescriptive easement. Thus, with respect to the instant dispute, I believe the trial court did not err in ordering that the city of Kentwood must compensate defendants for all land taken from them that lies outside the established use. However, by revivifying the statute, we today make all land abutting a highway created by user subject to the creation of an easement of the statutorily presumed width. Because today's holding "overrules settled precedent," we should give it prospective application only. *Lindsey v Harper Hosp,* 455 Mich 56, 68; 564 NW2d 861 (1997). This would mean that the greater amount of land that the statute allows to be used by way of easement could be secured if the prescriptive period of the statute runs from this time forward and the fee holder does not act to manifest lack of acquiescence in such use.

WEAVER, J. *(dissenting).* I dissent from the majority's interpretation of MCL 221.20; MSA 9.21, the high-way-by-user statute. I believe the majority's interpretation sanctions the unconstitutional taking of private property without compensation in violation of the Fifth Amendment of the United States Constitution and art 10, § 2 of the Michigan Constitution. The majority's interpretation also violates appellees' Fourteenth Amendment right to procedural due process.

The majority relies on *Bumpus v Miller,* 4 Mich 159

(1856), to support its holding that the highway-by-user statute authorizes taking more property than has been actually used by the public. However, this interpretation of *Bumpus* was expressly found unconstitutional by subsequent decisions of this Court, including, *Eager v State Hwy Comm'r,* 376 Mich 148; 136 NW2d 16 (1965), and *Smith v State Hwy Comm'r,* 227 Mich 280, 283-286; 198 NW 936 (1924).

Further, the majority incorrectly relies on *Bd of Regents of State Colleges v Roth,* 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972), and *Texaco v Short,* 454 US 516; 102 S Ct 781; 70 L Ed 2d 738 (1982), to justify placing the burden of preserving a fee simple interest in real property on the property owner. The majority would impose on modem property owners the burden of proving that a predecessor in title, of perhaps 160 years ago, acted within the first 10 consecutive years after the highway was first established, in order to rebut a fictional offer of dedication of four full rods implied from that predecessor's acquiescence to the public use of less than four rods.[1]

Finally, the decisions of this Court which are subsequent and contrary to *Bumpus,* spanning 1883 to 1965, eliminate the value of any "notice" that can be ascribed to property owners by the mere enactment of the highway-by-user statute.

---

[1] Or 20 years, depending upon when the highway was established. As will be discussed below, parts I(C) and II, the time, and indeed the width, prescribed by the highway-by-user statute, has varied since its original enactment.

For all practical purposes, the presumption of an implied dedication of four rods as defined by the majority is irrebuttable and, therefore, unconstitutional because it amounts to nothing less than the seizure of property without just compensation or actual use.

I would affirm the circuit court holding and reaffirm this Court's decisions in *Eager v State Hwy Comm'r,* and *Smith v State Hwy Comm'r, supra,* that the highway-by-user statute is constitutional only when interpreted to afford the public a highway as wide as has been actually used.

I

The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation.' Const 1963, art 10, § 2 similarly provides:

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

There has never been any doubt that this prohibition applies to the physical seizure of real property. I believe that the highway-by-user statute should be read as limiting the presumption of width to the extent actually used. The majority's interpretation, which creates a four-rod presumption, effects a physical seizure of property without compensation and is, therefore, unconstitutional.

A

The highway-by-user statute currently provides in

pertinent part:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width . . . [MCL 221.20; MSA 9.21.]

This Court has interpreted the highway-by-user statute to create a rebuttable presumption that a property owner abutting a highway established by use impliedly dedicated the land for use as a public highway. See, e.g., *Smith v State Hwy Comm'r and Eager, supra*. The question in this case regards the width of the highway established by the implied dedication.

Implied dedications are distinguishable from statutory dedications. Statutory dedications require actual written dedication by a recorded plat describing the scope of land dedicated and actual acceptance and maintenance by the appropriate public authorities. Implied dedications, on the other hand, require no actual writing, only a fictional offer implied from the property owner's acquiescence to public use, and the acceptance of the fictional offer by actual use and maintenance of the dedication by the appropriate public

authority.[2] Whether implied or by statute, an offer to dedicate requires actual acceptance in the form of use by the public entity with authority over the road. *Indian Club v Lake Co Rd Comm'r,* 370 Mich 87; 120 NW2d 823 (1963), and *Wayne Co v Miller*, 31 Mich 447, 448449 (1875).[3]Acceptance of implied dedications is garnered from "the facts and surrounding circumstances." *Smith v State Hwy Comm'r, supra,* p 286.

Other state courts addressing similar highway-by-user

---

[2] The standard method for statutory dedication is by plat under the Land Division Act, MCL 560.101; MSA 26.430(101). See, e.g., 2 Cameron, Michigan Real Property (2d ed), § 25.13, pp 1166-1167; see also Kraus v *Dep't of Commerce,* 451 Mich 420; 547 NW2d 870 (1996) (involving statutory dedication by plat). Unlike implied dedications, statutory dedications do not suffer the uncertainty of proving a fictional offer because when [an] owner of property files or records a plat which marks or notes on plat portions of premises as donated or granted to public; it results in conveyance of dedicated portions in fee simple, to public." Black's Law Dictionary (6th ed), p 413. Thus, the majority's reference to English case law for the proposition that the highway-by-user statute modified the common law and "eliminated the need to prove a fictional event" is inappropriate. *Ante,* p__. Far from eliminating the need to prove a fiction, this Court's interpretation of the highway-by-user statute as being an implied dedication still effectively requires proof of a fictional offer and an actual acceptance derived from the surrounding facts and circumstances. *Smith v State Hwy Comm'r, supra* p 286.

[3] The obvious import of requiring acceptance is that private property and the associated costs of maintaining it cannot be forced on a public authority without its consent.

statutes do so in terms of prescription, requiring evidence of open, notorious, and uninterrupted use by the public. Indeed, one Michigan case discusses the highway-by-user statute in terms of prescription. See, e.g., *Village of Manchester v Clarkson,* 195 Mich 354, 363; 162 NW 115 (1917). I believe that prescription is the more appropriate theory to apply to the highway-by-user statute because it is the evidence of use adverse to the abutting property owners for a prescribed period that establishes a highway by use. It is only constitutional for the government by statute and without compensation to offer up vested property rights for public use if the. government demonstrates acceptance through actual use in response to the fictional offer of implied dedication, and then only to the extent actually used. In this respect, implied dedication is the functional equivalent of prescription.

Applying either prescription or implied dedication, it is the evidence of public use and maintenance by public authorities that is determinative of the existence of a public highway. Failure by the public to use the full four rods anticipated by the highway-by-user statute simply results in the public's acquiring less than four rods. Indeed, a highway by user is not "affected by the fact that the land within the highway boundaries may be of a width less than four rods *or more than four rods." Trowbridge v State Hwy Comm'r,* 296 Mich 587, 599; 296 NW 689 (1941) (emphasis added). *Trowbridge* held that the fact that the strip of land between the paved, portions of a super highway was wider than four rods would not prevent that strip from becoming a highway by user under the statute because a highway by user is as wide as actually used. *Id.*

B

Contrary to this precedent, however, the majority reads the highway-by-user statute to create a rebuttable presumption that the highway is four rods wide, regardless of the extent of actual use. The majority's assumption that the Legislature can draft a statute that destroys a fee simple interest in real property without compensation or proof of actual use is no less than a sanctioning of the unconstitutional seizure of private property.

The majority claims that the highway-by-user statute merely modifies common-law dedication by allowing the government to take more than has been actually used. See *ante*, p__ and n 2 *supra*. However, regardless of the common-law theory being modified by statute, the Legislature is bound by the federal and state constitutions.[4] It is fundamental that a statute cannot offend or amend the constitution. Thus, the majority's interpretation, which would effectively hold that the mere enactment of the high-way-by-user statute operates to acquire property beyond that actually used, sanctions the unconstitutional taking of private property for public use without compensation.

---

[4] The concept that the taking of private property for public use without just compensation being paid therefor was included in every document governing Michigan from the ordinance for government of the Northwest Territory of 1787 to the Michigan Constitution of 1963. See, e.g., Gov't of Northwest Territory, art 2, 1805 Gov't of Michigan Territory, § 2; 2>Const 1835, art 1, § 19; Const 1850, art 15, § 9 and art 18, § 14; Const 1908, art 13, § 1 and § 5; Const 1963, art 10, § 2.

The concurrence/dissent similarly suggests that the highway-by-user statute merely modifies the common law of prescription. The concurrence/dissent's argument that fee is not lost because the highway-by-user statute takes only an easement, however, is contrary to *Nollan v California Coastal Comm,* 483 US 825, 831-832; 107 S Ct 3141; 97 L Ed 2d 677 (1987), where the Supreme Court recognized:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking . . . . [W]e [have] observed that where governmental action results in "[a]l permanent physical occupation, of the property, by the government itself or by others . . . "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." . . . We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

Further, in apparent reliance on *Texaco, supra,* the concurrence/dissent appears to argue that there is no

difference between modifying the common-law duration of prescription and modifying the scope of prescription. However, the concurrence/dissent fails to understand that the duration of the prescriptive period is an issue of procedural due process, while modifying the scope of property acquired by prescription necessarily implicates the Fifth Amendment's substantive prohibition against the government's seizure of property without just compensation.

I

For its proposition that an abutting owner must rebut his, or his predecessor's, implied dedication of a full four rods, the majority relies on this Court's decision in *Bumpus v Miller, supra.*[5] While the majority may be "reaffirming"

---

[5] The majority also cites *Fuller v Grand Rapids,* 105 Mich 529; 63 NW 530 (1895), and understandably without discussion, because it is inapplicable to any interpretation of the highway-by-user statute. The case does not mention the highway-by-user statute or any case interpreting it.

The road at issue in *Fuller* was established by resolution of the common council, not by use. As noted by the Court, the road was either "appropriated to the public use ... by condemnation [and] the owner . . . compensated in damages for taking of the land" or it was "dedicated" and the "compensation" took the form of the benefit the plaintiff's predecessor received from the construction of an adjacent public highway. *Id.,* p 532. As to the possibility of dedication, assumably the Court meant dedication by plat (e.g., statutory dedication) by the plaintiff's predecessor because "compensation" in the form of benefits from an adjacent highway is irrelevant in the context of implied dedication.

Further, the road in question was established in 1884 and the plaintiff purchased the property in 1886. *Id.,* p 530. Evidently

Bumpus, it fails to acknowledge a line of subsequent Michigan case law that is contrary to *Bumpus.*[6]

The interpretation of the highway-by-user statute attributed to *Bumpus* by the majority was expressly held unconstitutional in *Eager v State Hwy Comm'r and Smith v State Hwy Comm'r, supra.* The *Eager* Court stated:

> Defendant claims that the road was created by user, under that statute, and is, therefore, 4 rods wide. For this conclusion defendant relies on *Bumpus v Miller,* 4 Mich 159, and *Kruger v LeBlanc,* 70 Mich 76 [37 NW 880 (1888)]. If they were authority therefor, we agree with the trial court that the later decisions of this

---

some time between 1884 and 1886, the plaintiff's predecessor erected a wall. Had this road been established by use, under any precedent of this Court, including *Bumpus,* the wall would have rebutted the implied dedication ff an implied dedication were at issue. The *Fuller* Court's discussion that the public's acquiescence to the construction of the wall did not give plaintiff or her predecessor rights in the roadway demonstrates the inapplicability of the *Fuller* case to the theory of implied dedications.

[6] As the majority points out, *ante,* p ___I did sign, but did not author *Kent Co Rd Comm v Hunting,* 170 Mich App 222; 428 NW2d 353 (1988). However, the majority has failed to point out that the constitutionality of the highway-by-user statute was not raised in that case and the Court did not address it. The majority further fails to point out that in *Jaschuk v Manistee Co Rd Comm,* 205 Mich App 322; 517 NW2d 318 (1994), the constitutionality of the statute was squarely presented, and I found that creating a four-rod presumption was an unconstitutional interpretation of the statute and an incorrect reading of *Eager, supra.*

> Court, in *Wayne County Savings Bank v Stockwell,* 84 Mich 586 [48 NW 174 (1891)], *Smith v State Highway Commissioner,* 227 Mich 280, and *Trowbridge v State Highway Commissioner,* 296 Mich 587, are to the contrary, holding that a highway by user becomes such to the width and extent used. *We agree with the trial court that 'privately owned land cannot become public road by user beyond the portion used as such merely by the above noted statutory pronouncement to that effect. To so hold would be violative of the Constitution* of 1850, art 18, § 14, Constitution 1908, art 13, § I, which prohibited taking by the public of private property except upon determination of necessity and just compensation being first made or secured." [*Id.*, pp 153-154 (emphasis added).]

This Court recognized in *Smith v State Hwy Comm'r, supra,* p 284, "[t]hat the legislature did not intend by the act . . . to change existing highways, and that it could not by legislative enactment take property of the individual without compensation is settled in this court."

The majority simply and completely fails to address this and also ignores a long series of opinions holding that highways established under the highway-by-user statute are not presumptively four-rods wide, but are only as wide as the extent used. See also *Scheimer v Price,* 65 Mich 638, 639; 32 NW 873 (1887), *Coleman v Flint & P M R Co,* 64 Mich 160; 31 NW 47 (1887), *Wayne Co Savings Bank v Stockwell, supra,* p 590, *and Trowbridge, supra.*

The majority's holding also renders meaningless this Court's repeated holding that a highway *or any portion of it* can be lost by nonuse, *Lyle v Lesia, 64* Mich 16; 31 NW 23 (1887); *Gregory v Knight,* 50 Mich 61, 64; 14 NW 700 (1883); *Smith v State Hwy Comm'r, supra.* Under these cases, even if a highway is initially presumed to be four-rods wide, failure to use a portion of the four rods should return the unused portion to the abutting and contiguous landowner. The current statutory period to establish non-use for highways that have been laid out is four years. MCL 221.22; MSA 9.23. It would be an absurdity to conclude, as the majority effectively does, that highways actually laid out can be lost by nonuse, but that a portion of highways established by use can never be lost by nonuse. Where there is a formal abandonment of a highway, evidenced by the intent to abandon and actual abandonment, the number of years that have passed is irrelevant. See, e.g., *Roebuck v Mecosta Co Rd Comm,* 59 Mich App 128, 132; 229 NW2d 343 (1975).

2

In addition to this, the majority's reliance on *Bumpus* is in error. The version-of the highway-by-user statute at issue in *Bumpus* did not provide that highways by user must be four-rods wide. *Bumpus'* conclusion that the statute did was a mistake. The version of the statute at issue in *Bumpus* discussed four-rods width only in terms of highways that were "laid out" by the "commissioners of highways," not those

highways established by use.[7] *Id.*, p 161. Highways established by use, are obviously not "laid out" by public authorities, but rather are established by years of use.[8] It is

---

[7] 1846 RS, tit 6, ch 24, § 18 stated: "Public roads to be laid out by the commissioners of highways, shall not be less than four rods wide."

[8] Support for this distinction is found in the early incarnations of the highway-by-user, statute. The section addressing which roads were highways clearly distinguished between highways "laid out . . . of which a record shall have been made" and those highways established by use over a prescribed period that are "not recorded." See, e.g., 1838 RS, tit 6, ch 4, § 42; 1846 RS, tit 6, ch 25, § 29; 1857 CL, tit 9, ch 22, § 1079; 1871 CL tit 9, ch 26, § 1268. Also, until 1881, all discussions of width within the highway-by-user statute were with respect to highways "laid out," not those established by use. We would note that the width of such highways varied significantly in the early years. In 1838, the original enactment stated all "[p]ublic roads to be laid out by the commissioners of highways, shall not be less than four rods wide; and private roads shall not be less than two rods wide," 1838 RS, tit 6, ch 4, § 26. The statutory width remained unchanged until 1857, when the statute stated, "Public roads to be laid out according to the provisions of this act, shall not be less than three rods wide, except in cities and villages ...." 1857 CL, tit 9, ch 22, § 1058. In 1871, the Legislature got even more specific by requiring public roads "laid out according to the provisions of this act . . . not be less than four rods wide, except in cities and villages," while private roads were not to be "less than one rod in width." 1871 CL, tit 9, ch 26, § 1256. It seems unlikely and would be contrary to due process that the Legislature could or would have intended that the width of highways established by use vary as much as did highways that were laid out by public authorities.

not until the 1881 version of the highway-by-user statute that the statute applies the four-rods width to both highways laid out and those established by use. The cases interpreting the 1881 and subsequent versions of the statute, and the majority's literal interpretation to be unconstitutional and limit the width of highways established by use to the extent actually used. See, e.g., *Scheimer v Price; Coleman v Flint & P M R Co; Wayne Co Savings Bank v Stockwell; Trowbridge; Eager; and Smith v State Hwy Comm'r, supra.*[9]

Further, 1846 RS, tit 6, ch 24, § 29 required use for 20 years or more rather than the mere 10 years required under today's highway-by-user statute. While an additional ten years of notice arising from actual use does not justify taking more than is actually used, given due process considerations discussed in part it is certainly a different circumstance than that presented today.

C

The majority next unsuccessfully attempts to distinguish its interpretation of the highway-by-user statute from the United States Supreme Court's holding in *Nollan v California Coastal Comm, supra. In Nollan,* the California Coastal Commission imposed a condition on the plaintiff's

---

[9] *McKay v Doty,* 63 Mich 581; 30 NW 591 (1886), without discussion assumed that the 1881 version of the highway-by-user statute created a four-rod presumption, but did not address the constitutionality of that presumption. The four-rod presumption was found unconstitutional subsequently in *Smith v State Hwy Comm'r and Eager v State Hwy Comm'r, supra.*

home reconstruction project allowing public access to the beach across the plaintiff's property. *Nollan* held that because there was no public purpose supporting the condition except the securing of an easement to facilitate public travel across private property, the government was required to condemn the property and pay just compensation. *Id.*, pp 837-839. The majority attempts to distinguish *Nollan* on the ground that "the Michigan statute allows the landowner to assert the right to the property within 10 years after the creation of the road as a public road by use." *Ante*, p__. The majority's analysis is flawed.

The error of the majority's reasoning regarding *Nollan* is based on its misinterpretation and misapplication of two United States Supreme Court decisions, and is further evidence of its failure to recognize the Fifth Amendment's and Const 1963, art 10, § 2's protection of fee simple interests in real property. The practical effect of the majority's interpretation of these cases is to shift the burden of proof from the government to the private property owner, that is, what should be the government's burden of demonstrating acceptance of the fictional offer of implied dedication is twisted to become the property owner's burden of showing that the fictional offer of implied dedication was of less than four rods.

In addition, to justify its conclusion, the majority relies on what is a flawed application of *Bd of Regents and Texaco, supra*. The majority cites *Bd of Regents* for the idea that the state may create and define property interests. While this idea is applicable where there is some question regarding

whether the person claiming a taking actually has a protected property interest, its application in this context, where the existence of a protected property interest (fee simple title) is not in doubt, is illogical.

Bd of Regents addressed whether a nontenured professor had a property right in continued employment. This question has little application regarding whether the ownership of real property is a constitutionally protected interest. *Bd of Regents* in fact recognized that there is no question regarding the protected status of real property when it stated:

> The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. [*Id.*, pp 571-572.]

Despite this, the majority combines the *Bd of Regents'* concept that states may determine property interests with, *Texaco, supra,* a case involving the ownership of mineral interests, to justify affording Michigan property owners whose land abuts public highways fee simple interests of "less than absolute duration." *Ante,* p __. Citing *Texaco v Short, supra,* a case addressing the constitutionality of an Indiana mineral lapse act, the majority concludes that the state may condition ownership of fee simple interests in real property on the owner's lack of action in opposition to the fictionally implied dedication of four rods within the first consecutive 10 years of use of a lesser amount of the owner's land as a public highway. Reliance on *Texaco* for this holding is unsound.

Texaco held that a state statute causing the ownership of mineral interests to lapse if the interest went "unused" for

a period of twenty years was constitutional.[10] However, *Texaco* recognized that its decision was of limited application. It stated:

> [T]he length of the period that is afforded to a mineral owner to use the interest, the variety and minimal extent of the actions that constitute a statutory use, and the length of the statutory grace period are sufficient to entitle the State to indulge in the assumption that--if no statutory use is made in a 20-year period and no statement of claim is filed in the 2-year grace period, if applicable--the mineral owner has abandoned the property. *We need not decide today whether the State may indulge in a similar assumption in cases in which the statutory period of nonuse is shorter than that involved here, or in which the interest affected is such that concepts of "use" and "nonuse" have little meaning. [Texaco, supra,* p 536,

---

[10] To satisfy the "use" requirement under the Dormant Mineral Rights Act at issue in *Texaco,* an owner of mineral rights had to show actual or attempted production, payment of rents or royalties, payment of taxes, or filing of a statement of claim with the local recorder of deeds. *Texaco, supra,* p 519.

The Michigan dormant mineral rights act, MCL 554.291 *et seq.;* MSA 26.1163(1) *et seq.,* defines the requisite use of oil or gas interests similarly. If an interest in oil or gas is deemed abandoned by nonuse, the interest reverts to the surface owner. This serves the purpose of unifying title to the benefit of the public by facilitating the development of subsurface resources and eliminating fragmented title. *Van Slooten v Larsen,* 410 Mich 21; 299 NW2d 704 (1980).

n 28 (emphasis added).]

It is logical, fair, and basic to procedural due process, as addressed in part II, to assume that a fee simple interest in land would be accorded the same *if not more* time to assert ownership than an interest in minerals. Yet the majority finds constitutional its interpretation of the 10-year period of the highway-by-user statute, thereby affording owners of fee simple interests in real property only half the 20 years afforded owners of mineral interests to protect their interest.

Further, the Concepts of "use" and "nonuse" have "little meaning" to a fee simple property owner. Tex*aco's* discussion of fee simple interests of less than permanent duration was in reference to mineral interests. Unlike mineral interests, which have historically been subject to requirements of expedient use, the concept of "use"[11] in the context fee simple title is irrelevant.[12] "Use" of property is only relevant

---

[11] The concept of "user," is defined as the "actual exercise or enjoyment of any right, property, drugs, franchise, etc." Black's Law Dictionary (6th ed), p 1543. The majority holding that the statutory four rods is literally four rods unless rebutted during the statutory period wreaks mischief on the concept of user by allowing the government more that it actually used.

[12] One case cited by *Texaco* and the majority for the proposition that states may permit unused or abandoned property interests to lapse after the passage of time, *Hawkins v Barney's Lessee,* 30 US (5 Pet) 457; 8 L Ed 190 (1831), is inapplicable because it involved, an action for ejectment under the law of adverse possession. Similarly, another case relied on by *Texaco* and the majority, *Wilson v Iseminger,* 185 US 55; 22 S Ct 573; 46 L

to fee simple title when it is the use by a person or entity seeking to adversely possess land from the holder of fee simple title. The holder of fee simple title is not required to use his land or to act in any way to prevent his losing it unless there is an adverse user. To take *Texaco's* statement out of context and apply it to fee simple interests in land is improper. It effectively transforms a fee simple interest into a fee simple defeasible, e.g., a fee that "may be defeated on the happening of an event.[13] The "event" that the majority would have defeat a fee simple is the random and unpredictable decision by public authorities to expand a public highway beyond what has actually been used.

There is simply no justification for the majority to equate the lapsing of mineral interests resulting from neglect with the government's taking of real property without just compensation or actual use. The majority astonishingly and without citation of any authority equates the abandonment of mineral interests to the implied dedication of real property because it "believe[s] that the analysis is the same under either." *Ante,* p ____. *Texaco* described the statutory extinguishment of a mineral interest as the mere "withdrawal of a remedy." *Id.,* p 528. The majority's comparison of abandoned mineral interests to fee simple title appears to be the destruction of a constitutional right masquerading as the mere "withdrawal of a remedy." See *El Paso v Simmons,* 379

Ed 804 (1902), addressed the lapsing of contracts for ground rent, not the lapse of fee simple title.

[13] Black's Law Dictionary (6th ed), p 415.

US 497, 506-507; 85 S .Ct 577; 13 L Ed 2d 446 (1965).

Support to distinguish the majority's application of the highway-by-user statute from mineral lapse acts is found in *Van Slooten v Larsen,* 410 Mich 21; 299 NW2d 704 (1980), where this Court upheld the constitutionality of Michigan's dormant minerals act. As to the claim that the dormant minerals act violated the defendant's constitutional protection against the deprivation of property without due process, this Court distinguished the effect of the dormant minerals act from statutes that require property owners in "possession of all" to act within a specified time or lose their property. The latter types of statute, this Court stated,

> have been held unconstitutional because a state cannot require one *in possession of all* that he demands to prosecute a suit to preserve his interest when no adverse interest is asserted by suit or possession .... [T]he act does not unconstitutionally change defendants' property rights into mere causes of action. [*Id.*, pp 41-42, citing *Groesbeck v Seeley*, 13 Mich 329 (1865) (emphasis added).]

A fee simple interest in real property is the "possession of all," its owner "is entitled to the entire property, with unconditional power of disposition during one's life, and descending to one's heirs and legal representatives upon one's death intestate. Such estate is unlimited as to duration, disposition, and descendibility." Black's Law Dictionary (6th ed), p 615.

The majority's conclusion that forcing a property owner to assert his right to property within the four rods

prescribed by statute by some manner "calculated to interfere with, disturb, or interrupt the use by the public, *or by instituting an action in court"* renders his fee simple interest into a mere cause of action. *Ante,* p__ (emphasis added). This interpretation violates the basic principle of fee simple title and is, therefore, unconstitutional.

The only case applying *Bd of Regents'* concept that the state may define property to real property did so in the context of regulatory taking, not the physical seizure of land. *Lucas v South Carolina Coastal Council,* 505 US 1003, 1030; 112 S Ct 2886; 120 L Ed 2d 798 (1992).[14] Regulatory taking involves the effect of zoning and environmental laws that may in some way limit or affect a property owner's use of his property. However, unlike the majority's interpretation of the highway-by-user statute, such laws do not give the government the right to possess or use the property owner's land. *Lucas* recognized that a state may regulate real property, but held that to impose a regulation that destroys all economically beneficial or productive use of land is unconstitutional. The Court likened such regulation to a physical invasion requiring compensation. *Lucas* recognized that a permanent physical invasion of real property "no matter how minute the intrusion, and no matter how weighty the public purpose behind it" requires compensation. *Id.,* p 1015. The majority's interpretation of the highway-by-user statute

---

[14] The majority's interpretation of the highway-by-user statute should be distinguished from cases addressing the regulation of land that does not destroy all economically beneficial use, because the effect of its interpretation literally is to seize property.

effects such a permanent physical invasion of real property and, therefore, is unconstitutional.

Thus, the majority's contention that the benefits of public highways justify the "slight burden" they would impose is absurd. See *ante,* p ___ . It is fundamentally contrary to taking jurisprudence to justify the seizure of property by balancing the value of a fee simple interest against its potential value and use to the public. To take *Bd of Regents'* statement that "[p]roperty interests, of course, are not created by the Constitution," *id.,* p 577, which refers to what, if any, property right exists in a nontenured professorship, and apply it so that it destroys a property owner's fee simple interest in real property flies in the face of the Fifth Amendment's admonition: "nor shall private property be taken for public use, without just compensation," and Const 1963, art 10, § 2.

As interpreted by the majority, the statute effects the same result that *Nollan* would have found unconstitutional, it "make[s] an easement across [property] available to the public on a permanent basis . . . . " *Id.,* p 831. Because the majority's interpretation of the highway-by-user statute exacts a permanent easement from all property owners whose land abuts public highways established by user beyond that actually used, I find its interpretation unconstitutional.

II

Although I would find dispositive the majority's substantive affront to the Fifth Amendment's protection of property and Const 1963, art 10, § 2, I must also address the majority's procedural due process analysis under the Fourteenth Amendment where a person is deprived of real property. The

majority casually rejects the appellee's argument that the four-rod presumption under the highway-by-user statute violates due process.

At its most basic level, procedural due process requires fairness. As recited by Nowak & Rotunda, Constitutional Law (4th ed), § 13.8, p 525, the essential elements of procedural due process are:

> (1) adequate notice of the charges or basis for government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker, (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision-maker, (7) a decision based on the record with a statement of reasons for the decision.

The fundamental unfairness caused by the majority's interpretation of the highway-by-user statute is the ineffectiveness of any notice that can be ascribed to past or present landowners by the mere enactment of the highway-by-user statute. Citing *Texaco, supra, the* majority states that the enactment of a statute is "generally" enough to afford citizens a "reasonable opportunity to familiarize themselves with the terms of a statute to advise its citizens of the lapse of a property right." *Ante,* p __ . The application of procedural due process standards from a mineral rights case to a case involving fee simple interests in real property is simply

incorrect[15] because it is recognized that when the property taken is real property, due process requires greater procedural protection. *Schroeder v City of New York,* 371 US 208; 83 S Ct 279; 9 L Ed 2d 255 (1962); *Walker v City of Hutchinson,* 352 US 112; 77 S Ct 200; 1 L Ed 2d 178 (1956).

The United States Supreme Court has held that the notice required when real property is taken is more than the mere enactment of a statute. *Id.* When real property is taken, due process requires that notice be given by mail to both the owner and the mortgagee of the property. *Id.* These cases found that forms of notification such as posting notices on trees and in local papers were insufficient where the name and address of persons directly affected are easily ascertainable. Given that this Court and MCL 211.61a; MSA 7.106 afford a property owner who has become delinquent in property taxes due process including notice by mail reasonably

---

[15] There is no case applying *Texaco's* holding to fee simple interests in real property, although *Texaco* stated that Indiana had defined mineral interest to be the equivalent of fee simple estates in land. *United States v Locke,* 471 US 84; 105 S Ct 1785; 85 L Ed 2d 64 (1985), upheld a statute terminating the rights of holders of unpatented claims on federal lands. However, "unpatented" simply means that the holder's rights were not vested, they held mere claims to land not the fee simple title to it. It should also be noted that Indiana's decision (and any other state's similar decision) to afford mineral estates protection equivalent to fee simple interests in real property was just that, a decision, not a constitutional mandate.

calculated to reach the property owner,[16] it is illogical and unreasonable to find less process due individuals whose property happens to abut highways established by use. It simply defies logic to assume that the enactment of a statute would be or has been sufficient to notify past, present, or future owners of property abutting public highways by user that the intent when the highway was established was to take more than that used.[17] Because the majority's interpretation of the highway-by-user statute effects a taking of property, notice must be given beyond that which can be attributed to the mere enactment of the statute. The majority's interpretation of the highway-by-user statute ignores reason

---

[16] See *Dow v Michigan*, 396 Mich 192; 240 NW2d 450 (1976).

[17] The concurrence/dissent cites *North Laramie Land Co v Hoffman*, 268 US 276; 45 S Ct 491; 69 L Ed 953 (1925); *Van Slooten, supra*, and *Curley v Beryllium Development Corp*, 281 Mich 554; 275 NW 246 (1937), for the maxim that property owners are presumed to know the law. However, the only case of the three addressing real property was *North Laramie, supra*, which addressed a condemnation statute. Like statutes involving delinquent property taxes discussed above, condemnation statutes provide for notice beyond the mere enactment of the statute. It bears repeating that the majority and the concurrence/dissent's interpretation of the highway-by-user statute affords no notice to property owners abutting highways established by use that the government intends to take more property than has actually been used beyond the mere enactment of the highway-by-user statute. Further, there is no clear language in the highway-by-user statute regarding what procedure a property owner must follow to prevent the establishment of the highway regardless of any presumption of width.

and fairness.[18]

Furthermore, the majority's contention that 10 years provides "ample" opportunity to rebut the four-rod presumption suffers from numerable flaws. For the modem property owner, it is not just "difficult to determine the date the highway was created," *ante,* p ___, n 7, but rather it is practically impossible to demonstrate that a predecessor rebutted the presumption.[19] The first obstacle is determining when a road began being used by the public. The second is to determine whether at that time, up to 160 years ago, the property owner acted in any way to. rebut the presumption. The third is discovering if ever over the course of the subsequent years the highway was lost by nonuse. Physical

---

[18] The concurrence/dissent's analogy to criminal due process afforded where a person's liberty interest is at stake is unpersuasive. There are basic differences between the taking of property without more notice than the enactment of a statute and the general rule in criminal prosecutions that ignorance of the law is no excuse. Most basically, a property owner's ownership is in violation of no law. Further, where a person's liberty is at stake, due process is guaranteed by law: a person is afforded *Miranda rights* including the right to an attorney, and an attorney is provided if the person is indigent, a speedy and fair trial before a judge, the right to an appeal, etc. *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[19] I also disagree with the majority that a property owner "will know when a road is created across his property to a relative degree of certainty." *Ante*, p__, n 7. Whether a public highway by use was established and when the establishment began has been the subject of a number of law suits. See, e.g., *Trowbridge, supra.*

proof of ancient fences or agricultural uses may be long faded. The memories of old-timers may well be rendered unavailable by death or may be too imprecise to assist a modem day property owner attempting to exclude public users beyond the extent of the highway actually used.

Most importantly, as addressed in part I(B)(1), our Court has not consistently agreed with the majority's interpretation of the statute or found it to be constitutional. Indeed, a leading authority on Michigan real property law recognized that there was "confusion" in early decisions regarding the scope of a public highway established by user. 2 Cameron, Michigan Real Property Law (2d ed), § 25.9, pp 1162-1163. Cameron concluded, following this Court's decision in *Eager, supra,* however, that it is now "fairly clear" that such highways are limited to the extent of use, even though the statute itself states that public highways "'shall be 4 rods in width.'" *Id.*, p 1162.

The significance that this Court's inconsistency regarding both the meaning of the highway-by-user statute and whether the majority's interpretation is constitutional would have had on the expectations of property owners and purchasers of lands abutting highways throughout the years is clear. Had a highway by user begun after this Court's decision in *McKay, supra,* in 1886, a consultation by a property owner or potential purchaser of property with an attorney would have revealed that the statute created a highway by user only to the extent of the width actually used. Legal research after 1924 and this Court's decision in *Smith v State Hwy Comm'r, supra,* would have shown the

application now proposed to be expressly unconstitutional. It is fundamentally unfair to take a modern property owner's land because of a predecessor's failure to act, when it would have reasonably been understood by the predecessor, given the decisions of this Court, that no action was necessary to limit the width of a public highway to the extent actually used.

The highway-by-user statute has seen significant changes in substance witnessed in the first half century of its creation. The length of time the statute has required to establish use is different from its original enactment in 1838. From 1838 to 1857 the statute prescribed no less than 20 years to establish a highway by user. Note, however, that there is a period between the 1846 and 1857 statutes, because both enactments prescribed 20 years for highways established before their enactment, but only 10 years after. It would have been then, and now under the majority's interpretation, very difficult if not impossible to determine how many years it took to establish a public highway by use if the use began between 1846 and 1857. From 1871 to the present, the statute has prescribed a mere 10 years. Because the majority forces a modern property owner to provide evidence that the use of four rods was rebutted by a predecessor who owned the property when the highway was first established, property owners face the additional difficulty of determining which period of years was sufficient at the time the public highway was first established.

Further, as illustrated in part I(C), the 10-year period provided owners of real property under the highway-by-user

statute cannot be found sufficient, given that the dormant minerals act provides 20 years to owners of mineral interests.

Further, there are idiosyncracies in the case law that leave property owners unfairly disadvantaged. For example, it was held that a property owner's mowing within the four-rod area is insufficient to rebut the implied dedication. *Eyde Bros Development Co v Eaton Co Drain Comm'r*, 427 Mich 271, 299; 398 NW2d 297 (1986).[20] However, it was also held that the same and even less frequent mowing by the government is sufficient to establish use. *Rigoni v Michigan Power Co*, 131 Mich App 336, 346; 345 NW2d 918 (1984). This disadvantage seems particularly ironic under the majority's interpretation because the government is permitted to have land it does not even mow, while the individual can mow the same land and yet still lose it.

Turning to the case at hand, the majority states that the property within the four rods of the highway was "never owned" by the current property owners because they presented no evidence that their predecessors rebutted the presumption within the 10-year period. However, the majority cannot tell us when the 10-(or was it 20-) year period ran because there is no evidence regarding the most critical factual information to the resolution of this case, when the highway was actually established by use. While I do not doubt

---

[20] *Eyde* held that the presumption of an implied dedication was not rebutted. Its citation of *Bumpus* and the idea that implied dedications under the statute are four-rods wide was dicta. See *Jaschuk v Manistee Co Rd Comm'r*, 205 Mich App 322; 517 NW2d 318 (1994).

that 52nd Street, at issue in this case, has been a highway by user for over one hundred years, that fact standing alone cannot justify concluding that the public acquired more land than it actually used. Rather, it illustrates the extreme difficulty, or in truth the practical impossibility, faced by the current property owner in attempting to demonstrate that a predecessor rebutted the majority's unconstitutional four-rod presumption. It cannot be fair to assume that the statute provided adequate notice to the current property owner's predecessor in title, given this Court's confusion with respect to the statute's effect and constitutionality.

I would hold that the mere enactment of this statute provided insufficient notice to afford past or present abutting property owners procedural due process, given that their fee simple interest in real property was and is at stake. Indeed, the only practical notice given to abutting property owners would have been and is public use and maintenance of the road, to the extent it is actually used and maintained.

III

In conclusion, I do not question the importance of highways either historically or presently. Rather I question the government's carte blanche seizure of land, as sanctioned by the majority, beyond that actually used from private property owners for public use without compensation or proof of actual use. I would find that the highway-by-user statute is constitutional as interpreted and applied for nearly a century, that is, a highway by user is only as wide as has actually been used. I would affirm the decision of the circuit court.

BRICKLEY, J., concurred with WEAVER, J.

APPENDIX B

STATE OF MICHIGAN
SEVENTEENTH JUDICIAL CIRCUIT COURT
(KENT COUNTY)

CITY OF KENTWOOD, a Michigan municipal corporation, Plaintiff,	)))Case No. 94-2059-CC
v.	)
ESTATE OF PAUL J. SOMMERDYKE, et al, Defendants,	)

/

MOTION

BEFORE THE HONORABLE DAVID SOET, JUDGE
Grand Rapids, Michigan - Friday, August 25, 1995

- - - - -

APPEARANCES:

FOR THE PLAINTIFF: MR. MARSHALL W. GRATE
(P37728)
Attorney at Law
5005 Cascade Road, SE
Grand Rapids, MI 49546
(616) 285-8899

FOR THE DEFENDANT: MR. SCOTT W. MORGAN

(P45544)
Attorney at Law
200 Calder Plaza Building
Grand Rapids, MI 49503
(616) 774-8000

FOR THE DEFENDANT: MR. TODD A. HENDRICKS
(P45782)
Attorney at Law
161 Ottawa Avenue, NW, #600
Grand Rapids, MI 49503
(616) 235-3500

* * *

city's viewpoint that that case presents a cleaner legal issue than the Sommerdyke parcel.

And even based on the affidavit which we -- was filed yesterday by the property owner -- I don't know if the Court has had a chance to look at that or not. We just got it yesterday. Mr. Waddell, the property owner -it appears in this affidavit that he mowed the grass, otherwise maintained and controlled the property. From the City's viewpoint, those facts place it directly within the case of Eyde v Eaton County Road Commission, and we do not believe the property will successfully rebut the presumption, assuming it does exist.

So our position is that with respect to the Waddell property we do need guidance from the Court where it wants to come down from the legal presumption with respect to the right-of-way. Of course, the City's position is there is a rebuttal of presumption and the property owner must demonstrate continuous activity, structure or whatever to

overcome it.

THE COURT: The case law is a real problem.

MR. GRATE: I understand.

THE COURT: There are Supreme Court decisions talking about a rebuttable presumption of a right-of-way four rods wide, 66 feet wide.

There are other cases that very clearly say that when the city uses property for a highway the city or the governmental agency's right-of-way only extends to the limit of the use, and it's very hard to reconcile those and understand at what point, if ever, a rebuttal presumption arises.

There is even some suggestions that it will be unconstitutional to have a 66 foot wide right-of-way if the use is less than that, because it would be a taking without compensation in violation of the constitution. I don't think that issue has ever been clarified.

The Jaschuk case, Jaschuk v Manistee County Road Commission, 205 Mich App 322, is in front of the Supreme Court on leave pending. The application for leave to appeal was filed a year ago, and it is still sitting there, and the Supreme Court hasn't decided whether to hear it or not. That case, at least, clearly presents the issue, and if they take it and if they decide it, we will have an answer.

At the present time, having looked at this and read the cases, it's my conclusion that Eyde Bros v Eaton County Drain Commission, 427 Mich 271; 398 NW2d 297 (1986) does not reverse Eager v State Highway Commissioner, 376

Mich 148, 136 NW2d 16 (1965), and that Jaschuk v Manistee County Road Commission is correct:

Now, as a matter of public policy, Eager and Jaschuk are not my favorite decisions, but I think they are the law at this point. Eyde Bros really doesn't get to the issue that you find in Eager and in Jaschuk. I think that until further instructed by the Supreme Court I have to operate on the assumption that Eager and Jaschuk are good law.

I am sure that as applied to these two cases the fences clearly limit the right-of-way. There may be other things that limit the right-of-way. I don't think just grass cutting limits rights-of-way, from the cases that I am reading. On the other hand, when the County is cutting grass and plowing, that may in fact establish a right-of-way for the County. They cut grass for other reasons. Adjacent land owners tend to cut grass for aesthetic reasons. The County cuts it to render the highways safe, and I think that that's relative with the duty to maintain the highway.

So when we get to trial I will probably give some instructions somewhat like that submitted by Mr. Spalding. I do have a question about the quantum of proof. He is proposing an instruction that the proofs must be clear and cogent, because that applies in adverse possession cases. I am not about to jump to that conclusion yet. If there is any case law on it, I would like to see it.

Are there any other questions I can answer for you this morning?

MR. HENDRICKS: No, your Honor.

MR. GRATE: I guess, your Honor, proceeding forward, how would you like us to prepare the orders with respect to the motions?

THE COURT: The motions for summary disposition are denied. The motions in limine are taken under advisement. We will have to push along to trial and get a little closer to this. I am not going to make any hard and fast rulings on what jury instructions I am going to give yet.

MR. MORGAN: Your Honor, with respect to the Sommerdyke motion, I think that we are pretty close in terms of your interpretation and where we are.

I think Mr. Grate and I had discussed when we were willing to stipulate to what the issues would be for trial that we would be having a trial based on -- largely on the factual issue of the extent of use of the road itself and whether it included certain things and didn't include certain things. I think that's --

THE COURT: I think the Court has to consider to enlarge a little the use made of the roadway and right-of-way by public utilities, if public utilities use it, and signs and things of that sort, but, again, I think the case law indicates that if there is a specific intrusion, such as to put up a sign, you don't simply measure from the center of the road to the sign and then announce that because one sign or one catch basin is located 30 feet from the center of the roadway that that means that there is a 30-foot right-of-way on that side for 2,000 feet or something of that kind. There is that particular catch basin assigned as part of the right-of-way, but it doesn't mean it continues throughout the length of the highway or

property.

Anything else, gentlemen?

MR. GRATE: I do not believe so at this time, your Honor.

THE COURT: Thank you, gentlemen.

(Proceedings concluded at 10:16 a.m.)

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF KENT

CITY OF KENTWOOD,	)
a Michigan municipal corporation	)Case No: 94-2059-CC
Plaintiff,	)
	)
v.	)
	)
ESTATE OF PAUL J.	)
SOMMERDYKE, et al., (CIONI	)
and WADDELL) Parcel No.	)
41-18-34-200-005),	)
Defendants.	)

_____/

Marshall W. Grate
CLARY, NANTZ, WOOD
HOFFIUS & COOPER
Attorneys for Plaintiff
700 Frey Building
300 Ottawa Avenue N-W
Grand Rapids, MI 49503
(616) 459-9487

Arthur C. Spalding
RHOADES, MC KEE, BOER,
GOODRICH & TITTA
Attorney for Defendants
Fernando Cioni and
Charles and Luciana Waddell,
600 Waters Building
161 Ottawa, N.W.

Grand Rapids, MI 49503
(616) 235-3500

At a session of said Court held in the City of Grand Rapids, Kent County, Michigan, on the 6th day of Sept., 1995.

PRESENT: HONORABLE H. DAVID SOET
Circuit Court Judge

The plaintiff, City of Kentwood, having filed its motion for summary disposition pursuant to MCR 2.116(C)(10), and the defendant having cross-filed its motion in limine for a specific jury instruction, and the Court having reviewed the parties' briefs, exhibits, affidavits and other attachments and having heard oral arguments on the parties' motions,

IT IS HEREBY ORDERED that the City of Kentwood's motion for summary disposition is denied and the defendant's motion in limine for a specific jury instruction is taken under advisement.

/s/_____
HON. H. DAVID SOET
Circuit Court Judge

Stipulated to as to
form and content:

/s/_____
Ma/shall W. Grate (P-37728)

Attorney for City of Kentwood

/s/_____
Arthur C. Spalding (P 0808)
Attorney for Defendant

Examined, Countersigned & Entered

SALLY MODDERMAN
Deputy County Clerk

Attest: A True Copy

/s/_____
Sally Modderman
Deputy County Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF KENT

CITY OF KENTWOOD, a Michigan municipal corporation,	) Case No. 94-2059-CC)
v.	) Hon. H. David Soet)
ESTATE OF PAUL J. SOMMERDYKE, et al., (CHARLES B. and LUCIANA WADDELL,	)))

Marshall W. Grate
ROBERTS, BETZ & BLOSS, P.C.
Attorneys for Plaintiff
555 Riverfront Plaza Bldg.
55 Campau, N.W.
Grand Rapids, MI 49503
(616) 235-9955

Arthur C. Spalding
RHOADES, MC KEE, BOER, GOODRICH & TITTA
Attorneys for Defendants
Fernando Cioni and
Charles and Luciana Waddell,
600 Waters Building
161 Ottawa, N.W.
Grand Rapids, MI 49503
(616) 235-3500

STIPULATED FACTS AND WAIVER OF JURY TRIAL

The Plaintiff, City of Kentwood, and Defendants, Fernando Cioni and Charles and Luciana Waddell, without waiving any objection as to relevancy, hereby agree and stipulate to the following facts:

1. City of Kentwood is a Michigan municipal

corporation located in Kent County, Michigan, (the "City").

2. On May 20, 1994 (the "Date of Taking"), the City brought a condemnation action pursuant to MCL 213.51, *et seq.*, the Uniform Condemnation Procedures Act ("UPCA").

3. The City by its resolution dated March 21, 1994, had determined that it was necessary for the health, safety and welfare of the public to acquire certain property interests for the purpose of widening and improving 52nd Street between Breton Avenue and East Paris Avenue in the City of Kentwood, Kent County, Michigan.

4. On May 20, 1994, the City recorded a declaration of taking with the Kent County Register of Deeds.

5. One of the parcels affected by this condemnation action is the property owned by defendants, Fernando Cioni and Charles and Luciana Waddell (the "Property Owners"), at 3160 52nd Street, Parcel Number 41-18-34-200-005 ("Waddell parcel").

6. The City has taken from the Waddell Parcel an area 50.03 in width by 1291.43 feet in length or a total of 64,610 square feet of land area.

7. The City also acquired an additional 30 feet wide temporary grading permit.

8. The City made a good faith offer of just compensation for these property interests on February 17, 1994, in which it offered to pay the Property Owners $6,700.10, which amount has been paid.

9. As of the Date of Taking, no portion of the

Waddell Property had been conveyed, formally dedicated or condemned for public highway purposes.

10. As of the Date of Taking, 52nd Street was improved on the south side of the centerline with a 10 feet wide asphalt street together with an additional 6 feet wide shoulder and ditch area. Property Owners concede that such 16 feet area (20,663 square feet of land area -- 16 x 1291.43 feet had become a highway by user as of the Date of Taking.

11. Plaintiff claim and the Property Owners deny that the entire area within 33 feet of the centerline of 52nd Street had become a highway by user as of the Date of Taking (the land area between 16 and 33 feet from the centerline of 52nd Street is described herein as the "Land Area in Dispute").

12. The Property Owners mowed the grass located within the Land Area in Dispute.

13. There were various trees of voluntary growth within the Land Area in Dispute.

14. The Property Owners did not maintain any structure within the Land Area in Dispute.

15. On October 25, 1979, Michigan Consolidated Gas Company applied for a highway permit from the Kent County Road Commission to lay a 2 inch gas line within the Land Area in Dispute, which application was approved by the Kent County Road Commission on November 5, 1979 (see Exhibit A attached hereto).

16. On November 9, 1983, the Michigan Consolidated Gas Company applied for a highway permit

from the Kent County Road Commission to lay a 1 inch gas line along the subject property, which application was approved on November 14, 1983, by the Kent County Road Commission (see Exhibit B attached hereto).

17. These gas lines were installed 26 feet from the centerline of 52nd Street.

18. On May 20, 1982, a Wolverine Paving, Inc., applied for a highway permit to install a residential driveway approach at 3160 52nd Street (see Exhibit C attached hereto).

19. There are no real estate instruments showing a conveyance of easements or fee simple transfer of property to Michigan Consolidated Gas Company.

20. The title work contains a right-of-way conveyance of an easement interest for an underground telephone cable to Michigan Bell Telephone Company in August of 1968, conveying an easement of one rod (16 ½ feet) width, the center line of said easement is 41.25 feet south of the center line of 52nd Street (see Exhibit D attached hereto).

21. During all relevant times recited herein, 52nd Street within the Waddell Parcel was under the sole jurisdiction of the City, but the Kent County Road Commission acted as the City's agent for permitting and maintenance purposes.

22. The Property Owners have not pursued any action against the Kent County Road Commission or Michigan Consolidated Gas Company for trespass or damages relating to the installation of the aforementioned gas lines.

23. The Property Owners shall be awarded just compensation, as of the Date of Taking, in the following mounts:

A. $.325 per square foot for the land area taken which is not subject to highway by user.

B. $400 for the driveway.

C. $100 for the temporary grading permit.

D. $248 for the tree taken which was located more than 33 feet from the centerline of 52nd Street.

E. An additional $11,180 for trees taken which were located within the Land Area in Dispute if Plaintiff fails to prove that the Land Area in Dispute had become a highway by user as of the Date of Taking.

24. In light of these stipulations, the parties agree to waive their demand for a jury trial and submit the case to the Trial Judge for a decision.

[Signatures on following page]

Dated: November 11, 1996

ROBERTS, BETZ & BLOSS, P.C.
Attorneys for Plaintiff
By: /s/_____
Marshall W. Grate (P37728)
Business Address & Telephone
555 Riverfront Plaza Building

55 Campau, N.W.
Grand Rapids, MI 49503
(616) 235-9955

Dated: November 11, 1996

RHOADES, MCKEE, BOER,
GOODRICH & TITTA
Attorneys for Defendants Waddell
By: /s/_____
Arthur C. Spalding (P20808)
Business Address & Telephone:
600 Waters Building
161 Ottawa N.W.
Grand Rapids, MI 49503
(616) 235-3500

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF KENT

CITY OF KENTWOOD, a Michigan municipal corporation, Plaintiff,	) Case No. 94-2059-CC
v.	)
ESTATE OF PAUL J. SOMMERDYKE, et al., (CHARLES B. and LUCIANA WADDELL, Defendants.	)

HONORABLE H. DAVID SOET
Circuit Judge

OPINION

NATURE AND HISTORY OF PROCEEDINGS

This is the City of Kentwood's condemnation action filed May 23, 1994 against these property owners, Charles and Luciana Waddell, and others, pursuant to MCL 213.51, *et seq., the* Uniform Condemnation Act, for the purpose of widening 52nd Street to accommodate anticipated future traffic needs. The original highway was 32 feet wide, 16 feet on either side of the centerline, and is to be extended to a distance of 50.03 feet from the centerline on either side. The original right of way was created by the Highway by User statute, MCL 221.20. That statute reads:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

CONTENTIONS OF PARTIES

According to the City, upon a showing of an open, notorious and exclusive use of any part of it as a public highway, this statute automatically designates the area 2 rods, or 33 feet, on either side of the centerline of a highway as a "highway by user" and therefore the City has the right to use that property for its own purposes such as expanding the road without paying the property owner just compensation for the taking except for the property beyond 33 feet. Alternatively, should this Court find that the statute does not automatically designate the property 33 feet from the centerline as a highway by user, the City argues that the placement of a gas line 26 feet from the centerline of the road constitutes use of the property as a highway under the statute, and therefore the

City may use up to 26 feet from the centerline for purposes of road expansion without paying the property owner just compensation for the taking.

If the City's first argument is correct, then the City would only be required to compensate the property owner for the additional 17.03 feet taken for the expansion beyond the 33 foot right of way created by the statute. Alternately, if the second argument is correct, then the City would be required to pay the property owner for any property taken beyond 26 feet from the centerline of the road, where the gas line is buried.

On the other hand, the property owners challenge the condemnation as a taking of property between the edge of the drainage ditch, 16 feet from the centerline, and the 33 foot line as well as the 17.03 feet beyond that line and demand just compensation. Their position is that the statute has been interpreted to designate property as highway by user only to the extent that it is so used and only 16 feet has been used for that purpose. They Contend that the subsequent placement of a gas line outside the 16 feet but within the 33 foot right of way is not sufficient use to constitute a highway by user and therefore the only land which may be designated as highway by user is that property 16 feet on either side of the centerline of the road. That being the case, the City would be required to compensate the property owner for all property taken beyond 16 feet from the centerline.

The question in the case, therefore, involves an interpretation of the Highway by User statute, MCL 221.20 and a determination of the amount of property requiring just

compensation.

FINDINGS OF FACT

The parties have stipulated to all facts in the case, leaving only the issue of law to be determined by this Court. Both parties agree that the width of the original road was 16 feet from the centerline to the edge of the drainage ditch. The parties also agree that this has become a highway by user under MCL 221.20.

Further, the parties agree that a gas line was laid 26 feet from the centerline and parallel to the road. Specifically, on November 9, 1983, the Michigan Consolidated Gas Company applied to the Kent County Road Commission for a highway permit to lay a 1 1/4 inch gas line parallel to the road 26 feet from the centerline, it was granted and the line installed. No easement for this use from the defendants or their predecessors in title exists.

It is also stipulated that on May 20, 1982 Wolverine Paving Company applied to the Kent County Road Commission for a highway permit to install a residential driveway at 3160 52nd Street on the Waddell property, it was granted and contracted. No recorded easement exists for this.

Additionally, the parties agree that an easement across defendant's property parallel to the highway does exist, apparently having been granted by deed by one of defendant's predecessors, for Michigan Bell Telephone Company. The easement granted on August 9, 1968, is one rod (16 ½ feet) wide with its center being 41.25 feet from the centerline of the highway. Thus this easement lies outside but abutting

plaintiff's claimed 33 foot right of way. An easement was also granted to Consumers Power Company on May 11, 1950 for its purposes.

The parties have also stipulated that there are numerous trees of voluntary growth within the disputed area beyond 16 feet from the centerline, that defendants mowed the area beyond 16 feet and that defendants did not erect or maintain any structures within it.

For compensation purposes, the parties have agreed that the City shall pay $.325 per square foot for land taken that is not designated as a highway by user under MCL 221.20. They have further agreed to payments of $400 for a driveway, $100 for a temporary grading permit, $248 for a tree taken beyond the 33 foot line from the centerline, and $11,180 for trees taken within the land in dispute beyond 16 feet if it is found to not be a highway by user.

Finally, it is stipulated that defendants property extends along 52nd Street beside the highway a distance of 1,291.43 feet.

CONCLUSIONS OF LAW

A. Is there a presumption that a 66 foot wide right of way exists.

The law in this case appears to be clear as stated by the Michigan Court of Appeals in *Jaschuk v Manistee County Road Commission,* 205 Mich App 322; 517 NW2d 318 (1994), *lv den and reh den* 450 Mich 861; 543 NW2d 314 (1995): "'[An] implied dedication under the statute [MCL 221.20, Highway by User] applies only to the extent of the

use." However, some decisions of the Michigan Supreme Court prior to *Jaschuk* have stated that MCL 221.20 should be interpreted as creating a rebuttable presumption that any easement created by the statute extends the full 33 feet from either side of the centerline. *Eyde Brothers Development Co v Eaton County Drain Comm,* 427 Mich 271; 398 NW2d 297 (1986). In *Eyde, the* Supreme Court stated that the "general highway law states, [that highway right of ways] are presumed to be four rods or sixty-six feet wide." Subsequent decisions have supported that interpretation, see *Laug v Ottawa Co Road Comm 'r,* 37 Mich App 757; 195 NW2d 336 (1972); *Rigoni v Michigan Power Co,* 131 Mich App 336; 354 NW2d 918 (1984); *Boone v Antrim City Bd of Rd Comm,* 177 Mich App 688; 442 NW2d 725 (1989); *Stevens v Drekich,* 178 Mich App 273; 443 NW2d 401 (1989).

In *Jaschuk,* the Michigan Court of Appeals reviewed this line of eases and concluded that the correct interpretation of the statute should be that easements are created by the statute to the extent of the use of the right of way. *Jaschuk, supra,* at 324. Quoting the Michigan Supreme Court's decision in *Eager v State Hwy Comm 'r,* 376 Mich 148; 136 NW2d 16 (1965), the court stated that, "privately owned land cannot become public road by user beyond the portion used as such merely by the [] statutory pronouncement." As the court of appeals further noted, "[t]he Supreme. Court does not favor abandonment of its prior decisions by implication." The Supreme Court's holding in *Eager* which predates *Eyde,* supra, appears clear and directly on point.

We understand that where a conflict exists between a

decision of the Court of Appeals and the Michigan Supreme Court we must follow the latter; but in this instance, although the Court of Appeals decision in *Jaschuk,* appears, at least superficially, to contravene *Eyde,* and several other decisions of the Supreme Court that postdate *Eyde, the* Supreme Court in *Jaschuk* denied both application and rehearing. Further we have considered *Eager,* and, while the Court of Appeals is probably not seeking our approbation, we concur in its conclusion that *Eager* is controlling precedent unaffected by the later holdings in *Eyde* and other cases.

A careful examination *of Eyde* discloses that factually it presents no issue of whether an expansion of an existing highway by user can or has occurred by operation of the statutory presumption. In *Eyde,* one of the litigants, Blue Cross, sought to construct a sewer "under Mt. Hope Highway." *Id.* at 275. The Circuit Court determined that the existing highway by user was limited to 14 ½ feet north of the centerline of the road, *id.* at 279, and Blue Cross then attempted to construct the sewer in compliance with that opinion within that right of way. *Id.* at 280. The Court of Appeals enjoined the construction and later reversed the trial court finding that a highway by user asserted public rights only as to the surface of the road and that an adjoining land owner, still owning a fee to the middle of the road, must be compensated for any use of the subsurface. *Id.* at 280. The decision of the Supreme Court in *Eyde* resolved that dispute by finding that once a highway by user has been established by use, abutting property owners are not entitled to compensation for other public use limited to the area within the limits of that road.

Review of *Cleveland v City of Detroit,* 324 Mich 327; 37 NW 2d 625 (1949) and *Grosse Pointe Shores v Ayres,* 254 Mich 58; 235 NW 829 (1931) cited by the Supreme Court in *Eyde,* at 283, is instructive. *Cleveland* does not present any issue of how a highway by user can be expanded as the underground parking facility proposed lay entirely within and beneath the existing, long established road. *Id.* at 529, 531,532. The issue was the same as in *Eyde:* whether other public uses within the existing line of the roadway will be allowed without compensation to abutting owners. *Ayres* does not involve the Highway by User Statute but rather the scope of use of a highway formally dedicated by deed.

The *Eager* holding is also reconcilable with *Eyde* because in *Eyde* the supreme court, did not consider the constitutionality of the presumption of statutory condemnation. As the Court of Appeals noted in *Jaschuk, the* issue was never presented. *Id. at* 324, 325.

The Supreme Court has stated in *Eager* that the statutory presumption in the Highway by User Statute violates constitutional prohibitions against "taking by the public of private property except upon determination of necessity and just compensation 'being first made or secured.'" *Eager, supra,* at 154. The Michigan Supreme Court denied appeal and rehearing On *Jaschuk,* 450 Mich 861; 539 NW2d 375 (1995). Thus, we conclude, *Jaschuk* correctly interprets *Eager* and is binding on this Court. We agree with its rationale but having done so we are still left with the question of whether the City, without reliance on any presumption, has proven a highway by user beyond the clearly existing 32 foot

wide roadway.

B. To what extent has the City proved a highway by user.

Having disposed of the statutory presumption in the preceding section of this Opinion and there being no evidence of any actual use by the City within the alleged 33 foot right of way exterior to the gas line buried by Michigan Consolidated Gas Company 26 feet from the centerline of the highway, we may initially conclude that plaintiff City at least owes defendants compensation for all property taken beyond that utility line a distance of 21.03 feet. The remaining question is whether installation of that gas line and the issuance of the driveway permit in 1982 constitutes such a use by public authority for public purposes as to expand the original highway by user.

The city acknowledges that *Jaschuk* may be relevant law, but argues that its holding also allows a highway by user up to the 26 foot line from the centerline of the road, based on the placement of the gas line. The City submits that *Jaschuk* creates a highway by use to the extent used and the term "used" includes the placement of gas lines, sewers, etc. The City cites *Eyde,* for support;

> Prior to *Cleveland,* we held that a condition subsequent in a deed formally dedicating land for highway was void as against public policy because it restricted uses "commonly adopted by public authority for the benefit of the people, such as sewer, water, gas, lighting and telephone systems." *Grosse Point*

> *Shores v Ayres,* 254 Mich 58, 64, 235 NW 829 (1931). Although the *Ayres* case involved the examination of a condition in a deed, the public policy statement recognizing the importance of using highway easements for other than travel is a persuasive argument for the case at bar. A highway easement is in the public and cannot be limited by individual perceptions of what the scope of that easement should be. *Eyde, supra* at 283.

We conclude the discussion in *Eyde* regarding the use of an easement for gas, phone and sewer lines merely discussed the legally permissible uses of existing highway easements, not whether such installations could be used to expand a highway by user. *Eyde* involved no issue of extension of the easement beyond its original limits by expansion into abutting property. Also, as previously noted (page *9, supra),* neither *Cleveland* nor *Ayres* cited in *Eyde* involved this issue.

Rigoni v Mich Power Co, 131 Mich App 336; 345 NW 2d 918 (1984) cited by plaintiff states the quantum and kind of proof necessary to establish the limits of a highway by user. After citing the Statute, MCL 221.20; MSA 9.21 the court states:

> This language has been heavily modified by subsequent case law. The elements of a highway by user have been elaborated to require evidence of a defined line of travel with definite boundaries, used and worked upon by public authorities, traveled upon by the public for ten (or in some situations eight)

> consecutive years without interruption in a manner open, notorious, and exclusive. . . *Rigoni* at 343.

We conclude then that to establish any extension of an existing highway by user there must have been open, notorious and exclusive use by public authorities and by the public. Applying this test to plaintiffs proofs we cannot agree that burying a gas line underground or issuing a driveway construction permit is open or notorious or exclusive. The purpose of such use is to give notice of the publics claim for all to see. Paving the driveway to a residence once and burying a gas line so it cannot be seen is neither open nor notorious. What is buried cannot be seen. It gives notice to no one. While an owner in possession who is present at the time of installation may know of the driveway or the gas line they give no notice to subsequent owners. The purpose of open and notorious use is to give continuing notice. Furthermore, as an abutting owner can use the land above a buried utility line that use is not an exclusive use. Finally, existence of a driveway leading to private property is not continuing notice of a public authorities claim to exclusive use.

We have read all cases cited by the parties and numerous others to which our attention was drawn. In no Michigan case do we find support for the suggestion that buried gas, sewer, phone or other utility lines expand a highway by user. To the contrary, there is ample authority for the conclusion that such use must be an actual highway use. In *Eyde, supra,* at 154 the court states:

> *DeFlyer v Oceana County Road Commissioners,* 374 Mich 397, holds that public use

> and maintenance of a portion of the land dedicated by an owner for road purposes constitutes an acceptance by the public or highway authorities of the whole. In that case it was held that there had been actions on the part of the landowners which had been the equivalent of a common-law dedication upon which the acceptance operated. In other cases with like holdings, dedication had occurred. In the instant case there had been no dedication, except as such may be implied or presumed from user for more than the statutory period of repose *(Kruger v. LeBlanc, supra; Campau v. City of Detroit,* 104 Mich 560), but such implied dedication, as last above indicated, applies only to the extent of the user. And for good reason, because *the implications of dedication resulting from the owner's permitting uninterrupted public user as a road for the statutory period arises from the fact that such user and statute governing same give the owner notice* that, if he means to dispute the rightfulness of the public user, he must assert his right within the statutory period by physical action or suit. (Emphasis added).

And in *Rigoni,* at 344, 345:

> Once the presumption is rebutted, the cases clearly hold that the highway cannot be wider than the zone of actual use which meets the test for highways by user outlined above. *Eager v State Highway Comm'r, supra,* pp 154-155. Defendant's attempt to distinguish the important *Eager* case is in vain. The intrusion maintained by the plaintiffs in this case may

> be less substantial than was the intrusion maintained by the landowner in *Eager* but it is clearly enough to rebut the presumption. In *Eager, the* nature and extent of the landowner's intrusion ceased to be of any importance once the presumption was rebutted. The only question remaining focused entirely on the defendant highway commission's use of the road. The highway could be no wider than the width the defendant was able to show had been actually used as a highway.

See also *Alton v Meeeuwenberg,* 108 Mich 629, 634 66 NW 571, (1886): "[T]o constitute a highway by user, there must be a defined line, and it must be used and worked upon by the public authorities, and traveled over and used for a period of years, without objection of the fee owner."

CONCLUSION

In light of our conclusions we find that plaintiff must compensate defendants a total of $26,210.89.

DATED: March 20, 1997

_____

H. David Soet, Circuit Judge

ATTEST: A TRUE COPY
/s/_____
D. Wringlinski
Deputy County Clerk

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF KENT

CITY OF KENTWOOD, a Michigan municipal corporation, Plaintiff,	)	Case No. 94-2059-CC
v	)	HON. H. DAVID SOET
CHARLES B. WADDELL and LUCIANA WADDELL, husband and wife, and FERNANDO CIONI, Defendants.	)	

Marshall W. Grate (P37728)
ROBERTS, BETZ & BLOSS, P.C.
Attorneys for Plaintiff
5005 Cascade Road, S.E.
Grand Rapids, MI 49546
(616) 285-8899

Peter A. Titta (P21476)
Arthur C. Spalding (P20808)
RHOADES, McKEE, BOER,
GOODRICH & TITTA
Attorneys for Defendants Waddell and Cioni
600 Waters Building

161 Ottawa Avenue, N.W.
Grand Rapids, MI 49503-2793
(616) 235-3500

At a session of said Court, held in the Hall of Justice in the City of Grand Rapids, County of Kent, State of Michigan, on the 16 day of April, 1997.

PRESENT: HONORABLE H. DAVID SOET, Circuit Judge

The above matter having been submitted on Stipulated Facts and Waiver of Jury Trial, as amended; the Court having issued its Opinion on March 20, 1997, concluding that the Plaintiff must compensate Defendants Fernando Cioni and Charles and Luciana Waddell the total amount of Twenty-Six Thousand Two Hundred Ten and 78/100 Dollars ($26,210.78), as just compensation for the taking of certain property interests for the purpose of widening and improving 52nd Street as described in the complaint filed herein; the amount of Six Thousand Seven Hundred Dollars ($6,700.00) having been paid by Plaintiff to Defendants Cioni and Waddell as estimated just compensation; and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiff, City of Kentwood, pay Defendants Cioni and Waddell the additional sum of Nineteen Thousand Five Hundred Ten and 78/100 Dollars ($19,510.78), together with interest in the amount of Four Thousand One Hundred Thirty-Two and 42/100 Dollars ($4,132.42) from May 23, 1994, through March 31, 1997, and additional interest thereafter at the rate of $3.9235 per

day until paid.

_____
H. David Soet
Circuit Judge

ATTEST: A TRUE COPY

/s/_____
D. Wringlinski
Deputy County Clerk

NOTICE OF ENTRY WAIVED:
ROBERTS, BETZ & BLOSS, P.C.

By: /s/_____
Marshall W. Grate (P37728)
Attorneys for Plaintiff

RHOADES, McKEE, BOER,
GOODRICH & TITTA

By: /s/_____
Arthur C. Spalding (P20808)
Attorneys for Defendants
Waddell and Cioni
Deputy County Clerk

Supreme Court, U S
F I L E D
FEB 1999
CLERK

No. 98-704

In The

Supreme Court of the United States

October Term, 1998

SOMMERDYKE ESTATE,

Petitioners,

v.

CITY OF KENTWOOD,

Respondent.

On Petition For Writ Of Certiorari
To The Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARSHALL W. GRATE
Counsel of Record
ROBERTS, BETZ & BLOSS, P.C.
5005 Cascade Road, S.E.
Grand Rapids, MI 49503
(616) 285-8899
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Michigan Supreme Court in *City of Kentwood v. Sommerdyke Estate*, 458 Mich. 642, 581 N.W.2d 670 (1998), erroneously ruled that the State of Michigan has the constitutional authority under its Highway By User Statute to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period.

PARTIES TO THE PROCEEDING

Petitioners

Charles D. Waddell and Fernando Cioni[1]

Respondent

City of Kentwood, State of Michigan

---

[1] Mrs. Waddell passed away during the pendency of this case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

RESPONDENT'S STATEMENT OF THE CASE 4

ARGUMENT I

Michigan's Highway By User Statute *Does Not* Impose A Taking 10

A. The highway by user statute lawfully conditions the retention of a property right upon the performance of an act within the limited period of time 10

B. The Michigan Supreme Court correctly ruled, consistent with United States Supreme Court decisions, that Michigan's highway by user statute is constitutional and does not create a taking of property without just compensation 18

ARGUMENT II

Michigan's Highway By User Statute Does Not Violate Due Process Of Law 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alton v. Meeuenberg, 108 Mich. 629, 66 N.W. 571 (1890) 24, 26, 27

Armstrong v. United States, 364 U.S. 40 (1960) 11

Barfnecht v. Town Bd. Of Hollywood Twp., 304 Minn. 505, 232 N.W.2d 420 (1975) 17

Bevan v. Brandon Township, 438 Mich. 385, 389-390, 475 N.W.2d 37 (1991) 11

Board of County Road Commissioners v. Flickinger, 687 P.2d 975 (Col. S. Ct. 1984) 17

Board of Regents v. Roth, 408 U.S. 564 (1972) 18

Bumpus v. Miller, 4 Mich. 159 (1856) ..13, 14, 17, 25, 26

Campau v. City of Detroit, 104 Mich. 560, 62 N.W. 718 (1895) 14, 26

City of Kentwood v. Sommerdyke Estate, 458 Mich. 642, 581 N.W.2d 670 (1998) ..... *passim*

Coleman v. Flint & P.M.R. Company, 60 Mich. 160, 31 N.W. 47 (1887) 26

Dunnick v. Stockgrowers Bank, 191 Neb. 370, 215 N.W.2d 93 (1974) 17

Eager v. State Highway Commission, 376 Mich. 148, 136 N.W.2d 16 (1965) 15, 16, 24, 27

Ellsworth v. Grand Rapids, 27 Mich. 250 (1873) 13, 14, 25, 26

TABLE OF AUTHORITIES – Continued

Page

Eyde Brothers Development Co. v. Eaton County Drain Comm'r., 427 Mich. 271, 398 N.W.2d 297 (1986) 14, 17, 27

Hawkins v. Barney's Lessee, 5 Pet. 457, 8 L.Ed. 190 (1831) 21

Hodel v. Irving, 481 U.S. 704 (1986) 20, 22

Jaschuk v. Manistee County Road Commission, 205 Mich. App. 322, 517 N.W.2d 318 (1994), *lv. den.*, 450 Mich. 861, 539 N.W.2d 375 (1995), *reh. den.*, 543 N.W.2d 314 (1995) 5, 7, 8, 10, 14, 15

Keidel v. Rask, 304 N.W.2d 402 (N.D. 1981) 17

Krueger v. LaBlanc, 70 Mich. 76, 37 N.W. 880 (1888) 14, 26

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1986) 22, 23

Peterman v. Department of Natural Resources, 446 Mich. 177, 521 N.W.2d 499 (1994) 11

Scheimer v. Price, 65 Mich. 638, 32 N.W. 873 (1887) 26

Smith v. State Highway Commissioner, 227 Mich. 280, 198 N.W.2d 936 (1924) 24

Texaco, Inc. v. Short, 454 U.S. 516 (1982) ..... *passim*

United States v. Locke, 471 U.S. 84 (1984) 20, 28

User v. Mobbs, 493 N.Y.S.2d 531 (1985) 17

VanSlooten v. Larsen, 410 Mich. 21, 299 N.W.2d 704 (1980), *cert. den.*, 455 U.S. 901 (1982) 20, 24

TABLE OF AUTHORITIES – Continued

Page

Wayne County Savings Bank v. Stockwell, 84 Mich. 586, 48 N.W. 174 (1891) 26

Wilson v. Iseminger, 185 U.S. 55 (1902) 21

STATUTES

28 U.S.C. § 1257(a) 1

43 U.S.C. § 1744 20

Ind. Code § 35-5-11-1 (1976) 19

Mich. Comp. Laws Ann. § 221.20 (West 1990), Mich. Stat. Ann. § 9.21 (Lexis 1997) 4, 12

Sec. 20 of Chapter 1 of 1881 Public Act 243 13

Sec. 29 of Chapter 25, p. 137, Revised Statutes of 1846 13

Sec. 29 of Chapter 25, p. 139, Revised Statutes of 1846 13

Sec. 42, Title 7, First Part of Revised Statutes in Michigan 1838 12

CONSTITUTIONS

U.S. Const. Amend. V 2, 17

U.S. Const. Amend. XIV § 1 2

Mich. Const. 1963, Art. I § 17 2

Mich. Const. 1963, Art. X § 2 ..... 3, 11

OPINIONS BELOW

The Michigan Supreme Court granted leave to appeal in this matter on September 23, 1997, bypassing decision by the Michigan Court of Appeals. *City of Kentwood v. Sommerdyke Estate*, 456 Mich. 868, 569 N.W.2d 616 (1997). The Michigan Supreme Court decided several procedural motions and motions granting leave to file amici curiae briefs. The Michigan Supreme Court's decision is reported at 458 Mich. 642, 581 N.W.2d 670 (1998), and is printed in Appendix A of Petitioners' Writ for Certiorari.

The Circuit Court for the County of Kent, State of Michigan, issued its opinion in this matter on March 20, 1997. The Circuit Court's opinion is printed at Appendix B, pp. 87a-99a of the Petitioners' Writ of Certiorari. The Circuit Court entered Judgment in Condemnation on April 16, 1997. The Judgment is printed at Appendix C in the Petitioners' Writ of Certiorari.

JURISDICTION

Respondent agrees with the Petitioners' statement of jurisdiction. The Michigan Supreme Court issued its opinion on July 31, 1998. The Petition for Writ of Certiorari was filed within 90 days of the issuance of that opinion. The jurisdiction in the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Const. 1963, Art. I § 17

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right

of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Mich. Const. 1963, art. X § 2

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

GENERAL HIGHWAY LAW
CHAPTER I – LAYING OUT, ALTERING AND DISCONTINUING HIGHWAYS

221.20. Public highway; definition, width

Sec. 20. All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be four rods in width, and where they are situated on section or quarter section lines, such lines shall be center of such roads, and the land belonging to such roads shall be two rods in width on each side of such lines.

Mich. Comp. Laws Ann. § 221.20 (West 1990); Mich. Stat. Ann. § 9.21 (Lexis 1997).

RESPONDENT'S STATEMENT OF THE CASE

The parties stipulated to the material facts of this case. This matter arises out of a condemnation action filed by the Respondent, City of Kentwood, State of Michigan ("City") to improve one of its streets, Fifty-second Street, which was created by use and subject to Michigan's highway by user statute. Mich. Comp. Laws Ann. § 221.20 (West 1990); Mich. Stat. Ann. § 9.21 (Lexis 1997). For decades, municipalities throughout the State of Michigan and public and private utilities have relied on the presumptive 4 rod (66 feet) wide right-of-way in Michigan's highway by user statute, for not only public travel, but also for providing their constituents the basic necessities of life, such as water, sewer services, electricity, heating fuels and communications.

On May 23, 1994, the City filed its condemnation action against all parties who had ownership in approximately thirty different parcels located on both the north and south sides of Fifty-second Street. To accommodate existing and anticipated traffic patterns and public transportation needs, the City expanded Fifty-second Street from two to four lanes and installed storm drains, curbing, sidewalks and concreted driveway entrances for private drives.

The City successfully resolved all concerns raised by the property owners except for the property owned by

the Petitioners, Charles D. and Luciana Waddell and Fernando Cioni at 3160 Fifty-second Street, Parcel No. 41-18-34-200-005. The Petitioners obtained title to this property on January 27, 1973.

The City acquired two different property interests from Petitioners' parcel. The City acquired a 30 feet temporary grading permit for which the City paid a $100 fee, and the City acquired a 50.3 feet wide strip of road frontage which included the existing 33 right-of-way from the center of Fifty-second Street. The Petitioners never challenged the necessity of the City's street improvement project.

Fifty-second Street originated decades ago as a county section line road. The public acquired the existing right-of-way for Fifty-second Street by use rather than by grant or express dedication. Since Fifty-second Street had been used as a public highway for decades, the City considered, consistent with its understanding of Michigan law, that the highway by user right-of-way was 66 feet wide, or 33 feet wide on each side of the center line of the existing road.

In reliance on the Michigan Court of Appeals decision of *Jaschuk v. Manistee County Road Commission*, 205 Mich. App. 322, 517 N.W.2d 318 (1994), *lv. den.*, 450 Mich. 861, 539 N.W.2d 375 (1995) *reh. den.*, 543 N.W.2d 314 (1995), the Petitioners contended that the City could only claim that part of right-of-way which it actually used. In this regard, the Petitioners did not contest the City's claim to 16 feet of the 33 feet wide right-of-way along their property. The 16 feet of undisputed right-of-way included a 10 feet wide asphalt street from the center line

of Fifty-second Street and an additional 6 feet wide shoulder and open drainage ditch area. The Petitioners claimed ownership to the remaining 17 feet wide area. The parties stipulated that Petitioners mowed the grass located within the 17 feet strip, but the Petitioners never maintained any structures or other activities within the disputed land area.

For the previous decades, the Kent County Road Commission acted as the City's agent for controlling uses within the right-of-way along Fifty-second Street. On November 5, 1979, the Kent County Road Commission approved an application submitted by the Michigan Consolidated Gas Company for a highway permit to install a 2" gas line within the 17 feet disputed land area. On November 14, 1983, the Kent County Road Commission approved a second highway permit for the Michigan consolidated Gas Company to extend the existing gas line. The gas company installed both gas lines approximately 26 feet from the center line of Fifty-second Street, which was about in the middle of the 17 feet disputed right-of-way. On May 20, 1982, the Kent County Road Commission approved a permit for an independent contractor, Wolverine Paving, Inc. to install a private driveway in the right-of-way of the Petitioner's parcel.

As noted above, the Petitioners purchased the property in 1973, before the Michigan Consolidated Gas Company installed its gas lines. There are no real estate instruments showing a conveyance of easements or fee title transfer of property to the Michigan Consolidated

Gas Company.[2] The Petitioners never pursued any legal action against the Kent County Road Commission or the Michigan Consolidated Gas Company for trespass damages resulting from the installation of the aforementioned gas lines.

On August 1, 1995, the City filed a motion for summary disposition which requested a legal determination on the Petitioners' claim to the 17 feet of disputed right-of-way. The City contended it could claim an easement interest to the entire 66 feet right-of-way along the Petitioners' parcel based on Michigan Supreme court case law. On the other hand, the Petitioners filed a cross motion asking the court to rule in their favor based on the Michigan Court of Appeals decision in *Jaschuk*. After entertaining oral argument on August 25, 1995, the trial court ruled that *Jaschuk* controlled and that the City would have to show actual use in order to claim the right-of-way.

The case was scheduled for a jury trial. However, because there were not many factual issues in dispute, the parties waived their right to a jury trial and agreed to submit the case for decision on stipulated facts, which were submitted to the trial court on November 11, 1996. In its submission, the City advocated two issues. First,

---

[2] The title work disclosed a right-of-way conveyance to the Michigan Bell Telephone Company in August of 1968. This easement was 16½ feet in width (1 rod) for an underground telephone cable. The center line of the easement was 41.25 feet south of the center line of Fifty-second Street. Thus, the telephone easement lies on the Petitioners' property directly adjacent to and south of the disputed 17 feet right-of-way.

the City reasserted that Michigan Supreme Court cases superseded the *Jaschuk* Court of Appeals decision, and based on the stipulated facts, the City enjoyed access to the entire standard 66 feet wide right-of-way under the highway by user statute. In the alternative, the City argued that the highway permits, issued by the City's agent, the Kent County Road Commission, evidenced actual control and use of the disputed right-of-way.

The trial court issued its written opinion on March 20, 1997. Once again, the trial court ruled that *Jaschuk* controlled the case. Secondly, the trial court ruled that the gas line did not amount to an actual use under the *Jaschuk* opinion. Consequently, the trial court awarded compensation of $26,210.89 to the Petitioners for the land area within the disputed 17 feet right-of-way. The trial court entered Judgment on its opinion on April 16, 1997.

On May 5, 1997, the City filed its Claim of Appeal by right in the Michigan Court of Appeals. In the meantime, on June 2, 1997, the City filed an application for immediate appeal to the Michigan Supreme Court. On September 23, 1997, the Michigan Supreme Court granted the City's application for leave to appeal prior to a decision by the Michigan Court of Appeals. The Michigan Supreme Court also granted motions to a number of parties to appear as amicus curiae, and it invited other interested persons and groups to move for permission to file briefs amicus curiae. The Michigan Supreme Court conducted oral argument on March 3, 1998.

The Michigan Supreme Court issued its decision on July 31, 1998. In the majority opinion authored by Justice

Cavanaugh, the Michigan Supreme Court upheld previous Michigan Supreme Court case law which ruled that the highway by user statute created a rebuttable presumption that highways created by use are 4 rods or 66 feet wide and that this rebuttable presumption, or implied dedication, did not impose a "taking" of private property without just compensation. The majority opinion found this rebuttable presumption to be in accordance with the United States and Michigan Constitutions which allow a governmental entity to condition the retention of property rights on the performance of an affirmative act within a reasonable statutory period. The majority opinion found that the statutory presumption did not violate due process of law. Consequently, the Michigan Supreme Court ruled in favor of the City and reversed the trial court's decision.[3]

Justice Taylor wrote a separate opinion, concurring in part and dissenting in part. Justice Taylor agreed with the majority opinion that the statute's presumption of a 66 feet wide implied dedication was constitutional, but he would have applied the ruling of the court prospectively from the date of the opinion.

Justice Weaver, who was joined by Justice Brickley, dissented. Justice Weaver had previously authored the controversial *Jaschuk* opinion when she was a judge on

---

[3] Because the majority opinion of the Michigan Supreme Court upheld the highway by user statute's rebuttable presumption of a 66 feet dedication for highway acquired by use, it did not address the City's alternative argument that the highway permits involving the disputed 17 feet area evidenced actual use.

the Michigan Court of Appeals. In her dissent she wrote that the majority opinion's interpretation of the highway by user statute is unconstitutional because it allows for the taking of property without just compensation. Justice Weaver interpreted Michigan's highway by user statute as limiting a public highway acquired by use to the width of actual use.

ARGUMENT I

Michigan's Highway By User Statute *Does Not* Impose A Taking.

A. The highway by user statute lawfully conditions the retention of a property right upon the performance of an act within the limited period of time.

In widening Fifty-second Street in relation to the Petitioners' property, the City asserted a property right to use the full 66 feet width of the right-of-way. The City's property interest existed decades before the Petitioners even became owners of the subject property in 1973. The Michigan Supreme Court in *Kentwood* upheld the City's claim under the highway by user statute, because a state has the authority to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period.

The Petitioners wrongfully attack Michigan's highway by user statute as confiscatory. They contend that the statute violates the Fifth Amendment which prohibits taking a property without payment of just compensation. From the City's point of view, the key question is whether Michigan's highway by user statute amounts to a taking.

The Michigan Supreme Court in *Kentwood* correctly determined that the statute's rebuttable presumption does not constitute a taking. In reaching this decision, the Michigan Supreme Court reaffirmed legal precedents that have existed in Michigan's jurisprudence for over 140 years, and it reaffirmed an interpretation of a statute that has existed in its essential form since Michigan's admission as a state into the Union in 1837.

The City agrees with Petitioner that the government cannot take private property without just compensation. From the time Michigan was a territory, Michigan courts have recognized that government cannot deprive an individual of his property without due process of law and without compensation. *Peterman v. Department of Natural Resources*, 446 Mich. 177, 186, 521 N.W.2d 499, 505 (1994). Both the Fifth Amendment of the United States Constitution and Article 10, Sec. 2 of Michigan's Constitution 1963, prohibit governmental taking of private property without just compensation. *Bevan v. Brandon Township*, 438 Mich. 385, 389-390, 475 N.W.2d 37, 40 (1991); *citing Armstrong v. United States*, 364 U.S. 40, 49 (1960).

However, just as it is wrong for the government to take private property without just compensation, the City submits that it is equally wrong to require the government to pay for a property interest that it already enjoys. In this case, when the Petitioners demanded just compensation for the 17 feet of disputed right-of-way, they were demanding compensation for a property interest they did not own.

The parties to this case stipulated that the subject street, Fifty-second Street, was a section line road which

had been used as a public highway for decades. The City claimed it owned the 66 feet wide right-of-way along Fifty-second Street under Michigan's highway by user statute which provides as follows:

> All highways regularly established and pursuant to the existing laws, all roads that shall have been used as such for ten years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use shall be four rods in width [66 feet] and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such road shall be two rods [33 feet] in width on each side of such lines.

Mich. Comp. Laws Ann. § 221.20 (West 1990); Mich. Stat. Ann. 39.21 (Lexis 1997)

This statute has existed in its essential form for 160 years. It can be traced back to 1838. *See* Sec. 42, Title 7, *First Part of Revised Statutes in Michigan 1838;*[4] *see also,*

---

[4] Sec. 26. Public roads to be laid out by the commissioners of highways, shall not be less than four rods wide . . .

. . .

Sec. 42. All public highways now in use, heretofore laid out and allowed by any law of this state, or of the late territory of Michigan, of which a record shall have been made in the office of the clerk of the county or township, and all roads not

Sec. 29 of Chapter 25, p. 137, *Revised Statutes of 1846*. The earlier versions of the statute, such as Sec. 29 of Chapter 25, p. 139, *Revised Statutes of 1846* had a twenty year period of use instead of a shorter period of eight or ten years. *See, Ellsworth v. Grand Rapids*, 27 Mich. 250, 255 (1873). The current statutes dates to Sec. 20 of Chapter 1 of 1881 Public Act 243. All versions of this statute mandated that a public highway acquired by use shall be four rods or 66 feet in width.

There is a long line of Michigan Supreme Court cases, one predating the Civil War, which has consistently upheld the statute's 66 feet wide right-of-way. In *Bumpus v. Miller*, 4 Mich. 159 (1856), the Michigan Supreme Court held that the statutory width of highways established by user was presumed to be four rods, or 66 feet. In this regard, the Michigan Supreme Court in *Bumpus* stated:

> The statute provides a public highway shall be four rods wide . . . whether the highway is acquired by user only, or under the provisions of the Constitution, it must be four rods in width. A dedication or donation, when not expressly or impliedly restricted by the owner, is not confined in the mere track which is beaten by carriages and the feet of animals in passing along, but includes and carries with it four rods in width, as provided by the statute. . . .

Id. at 164.

---

recorded, which have been, or shall have been used as public highways twenty years or more, shall be deemed public highways, but may be altered according to the provisions of this chapter.

Thus, beginning with *Bumpus*, the Michigan Supreme Court interpreted the highway by user statute as creating a rebuttable presumption that a property owner intended to dedicate a 66 feet wide right-of-way to the public. To rebut the presumption, the land owner had to assert his right within the prescribed period by either affirmatively interfering with the public use, such as erecting a structure in the right-of-way, or initiating a legal action. Through the years, the Michigan Supreme Court repeatedly endorsed this statutory rebuttable presumption of 66 feet. *See, Ellsworth v. Grand Rapids*, 27 Mich. 250 (1873); *Krueger v. LaBlanc*, 70 Mich. 76, 79, 37 N.W. 880 (1888); *Campau v. City of Detroit*, 104 Mich. 560, 62 N.W. 718 (1895); *Eyde Brothers Development Co. v. Eaton County Drain Comm'r*, 427 Mich. 271, 398 N.W.2d 297, 309-310 (1986).

Despite this array of legal precedents, in 1994 the Michigan Court of Appeals decided *Jaschuk v. Manistee County Road Commission*, 205 Mich. App. 322, 517 N.W.2d 318 (1994), *lv. den.*, 450 Mich. 861, 539 N.W.2d 375 (1995); *reh. den.*, 543 N.W.2d 311 (1995) which ruled that the 66 feet wide rebuttable presumption under the highway by user statute was unconstitutional. *Jaschuk* restricted the public easement to actual use.[5]

---

[5] As noted above, the *Jaschuk* decision was authored by Judge Elizabeth Weaver, who at the time served on the Michigan Court of Appeals, and she subsequently wrote the dissenting opinion in the subject case as Justice Weaver of the Michigan Supreme Court.

Both *Jaschuk* and the Petitioners mistakenly rely on the Michigan Supreme Court case of *Eager v. State Highway Commission*, 376 Mich. 148, 136 N.W.2d 16 (1965). The Petitioners contend that *Eager* invalidated the 66 feet rebuttable presumption as an unconstitutional taking. The City respectfully submits that the Petitioners have mischaracterized the *Eager* decision. In *Eager*, the land in dispute had been continuously used and maintained by the property owners for more than fifty years, first as a private parking space for a hotel and then subsequently as gasoline pumps for a gas station. *Eager* correctly held that in that circumstance it was inappropriate to take property without payment of just compensation. *Eager* did not obliterate the statutory presumption of 66 feet, but instead the Michigan Supreme Court in *Eager* expressly recognized the principle of the statutory presumption:

> In the instant case there has been no dedication, except as such may be implied or presumed from user for more than the statutory period of repose (*Krueger v. LaBlanc, supra; Campau v. City of Detroit*, 104 Mich. 560, 62 N.W. 718 (1895)), but such implied dedication, as last above indicated, applies only to the extent of the user. And for good reason, because the implications of dedication resulting from owners permitting uninterrupted public user as a road for the statutory period arises from the fact that such user and statute governing same give the owner notice that, if he means to dispute the rightfulness of the public user, he must assert his right within the statutory period by physical action or suit.

136 N.W.2d at 19. *Eager* was simply one case in which the property owner successfully rebutted the presumption of 66 feet by demonstrating actual use of the right-of-way.

Therefore, from the City's standpoint, the Petitioners' first argument for review is flawed in at least two respects. First, the Petitioners continue to rely on misconception of the *Eager* decision. In their brief in support of their Writ of Certiorari, the Petitioners all but ignore the *Kentwood's* analysis of *Eager*, which correctly interpreted the law and distinguished *Eager* as one case where the property owner successfully overcame the rebuttable presumption.[6]

---

[6] The Michigan Supreme Court correctly interpreted and applied the *Eager* holding in the *Kentwood* decision. In this regard, the Michigan Supreme Court in *Kentwood* stated:

> We recognize that after establishing a presumption of dedication had been rebutted, the court in *Eager* made the assertion that privately owned land cannot become public road by user beyond the portion used as such merely by the statutory pronouncement to that effect. We believe that this sentence, when read in the context of the whole opinion, supports our proposition that *where there is evidence that the presumption has been rebutted within the statutory period*, privately owned land cannot become a public road merely because the statute presumes the road to be four rods wide. To the extent that the dissent claims that this statement supports the proposition that the public road is *always* only as wide as actual use, we disagree. If we read *Eager* to support the proposition of the dissent, the court's alleged pronouncement that a road is always only as wide as actual use would be dicta because, as noted previously, the presumption was effectively rebutted in that case. To be sure, we now clarify our holding in *Eager* and limit it to cases

Secondly, the Petitioners' Writ is flawed because it unjustifiably seeks further review of 160 years of Michigan jurisprudence involving the scope of Michigan defined property right, a Michigan statute and a century of Michigan legal precedents, which have demonstrated ample sensitivity to the Fifth Amendment takings issue.[7] *See, e.g., Bumpus*, 4 Mich. at 163; *Eyde Brothers*, 398 N.W.2d at 308-310, *supra*.

---

where the presumption has been rebutted. The public road is only as wide as actual use when the plaintiff presents evidence that the presumption of dedication has been rebutted within the statutory period of repose. 581 N.W.2d at 677.

[7] Petitioners noted in footnote 7 of their brief that other jurisdictions which have addressed highway by user statutes have determined that a public way established by user is only as wide as the actual use. *Citing User v. Mobbs*, 493 N.Y.S.2d 531 (1985); *Keidel v. Rask*, 304 N.W.2d 402 (N.D. 1981); *Barfnecht v. Town Bd. Of Hollywood Twp.*, 232 N.W.2d 420 (1975). Without going into detail, the City believes these cases are distinguishable, for among other reasons, these cases do not discuss whether a state's conditioning retention of a property interest on the performance of an affirmative act within a specified time period amounts to a taking. *See Texaco v. Short*, 454 U.S. 516 (1982). In any event, other state jurisdictions which have interpreted their highway by user statutes have found them constitutional. *See, Board of County Road Commissioners v. Flickinger*, 687 P.2d 975, 984 (Col. S. Ct. 1984); *Dunnick v. Stockgrowers Bank*, 191 Neb. 370, 215 N.W.2d 93, 96 (1974).

B. **The Michigan Supreme Court correctly ruled, consistent with United States Supreme Court decisions, that Michigan's highway by user statute is constitutional and does not create a taking of property without just compensation.**

The Michigan Supreme Court in *Kentwood* ruled that a state, such as Michigan, has the authority to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period. 581 N.W.2d at 676. This holding is entirely consistent with decisions by this Court.

First, the Michigan Supreme Court in *Kentwood* properly reasoned that the statutory presumption of a 66 feet wide right-of-way merely defines the scope of a property interest in private land. A state has the right to define the nature of property interest, and it can define property interest in derogation of the common law. For example, in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court stated:

> Property interests of course are not created by the Constitution. Rather, they are created and the dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or undertakings that secure certain benefits and that support claims of entitlement to those benefits.

Secondly, the Michigan Supreme Court in *Kentwood* correctly applied this Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), which effectively refutes the Petitioners' takings argument. In *Texaco*, this Court considered a challenge to an Indiana statute regarding the

automatic lapse of mineral rights. Pursuant to this statute, a mineral interest in land that is owned as a separate subterranean estate, which was not used for a period of twenty years, automatically lapsed and reverted to the current surface owner of the property, unless the mineral owner prior to the end of the twenty year period or within a two year grace period after the effective date of the statute, filed a statement of claim in the local county recorder's office.[8] The property owners in *Texaco* asserted, among other arguments, that this statute unconstitutionally effectuated a taking of property without just compensation. This Court disagreed. The Court in *Texaco* observed that it has:

> [U]pheld the power of the state to condition the retention of a property right upon performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest and fee were determined as a matter of law to be abandoned and to lapse.

454 U.S. at 529. In rejecting the takings argument, this Court stated further:

> In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the state to

---

[8] Any interest in coal, oil and gas, and other minerals, if used for a period of twenty years, may be extinguished, unless the statement of claims is filed in accordance with Sec. 5 hereof [sic], and the ownership shall revert to the then owner of the interest out of which it was carved. Ind. Code § 35-5-11-1 (1976); *cited in Texaco*, 454 U.S. at 518, n.3.

> compensate the owner for the consequence of his own neglect. We have concluded that the state may treat a mineral interest which has not been used for twenty years and for which no statement of claim has been filed as abandoned. It follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make use of the property – and not the action of the state – that causes the lapse of the property rights; there is no "taking" that requires compensation.

Id. at 530.[9]

Texaco has continued to provide guidance to this Court in deciding takings cases. For example, in *United States v. Locke*, 471 U.S. 84, 103-110 (1984), this Court relied extensively on *Texaco* in rejecting a constitutional challenge to a United States government statute (43 U.S.C. § 1744) which caused owners to forfeit their unpatented mining claims if they failed to comply with annual filing requirements. Justice Stevens cited extensively to the *Texaco* case in writing a concurring opinion in *Hodel v. Irving*, 481 U.S. 704, 729-732 (1986), which concerned a challenge to a statute which sought to ameliorate the fractionalization of Indian lands held in trust.

Kentwood is not analytically distinguishable from *Texaco*. Michigan declared as early as 1838 that a property

---

[9] Michigan has a similar type statute as the one at issue in *Texaco*. Michigan's dormant mineral act has withstood similar constitutional challenge before the Michigan Supreme Court. *VanSlooten v. Larsen*, 410 Mich. 21, 299 N.W.2d 704 (1980), *cert. den.*, 455 U.S. 901 (1982).

owners' retention of their interest in a public highway established by use is conditioned on the performance of certain actions, within a prescribed time period, presently eight or ten years. This statute applies uniformly to all persons owning property in Michigan. If a Michigan property owner permits the public to use a portion of his property as a public road, then the statute puts the property owner on notice that his property interest will be subject to the 66 feet wide right-of-way. The statute is not coercive. The decision to permit the public use of private property resides solely in the discretion of the property owner. The statute in no way forces the property owner to permit such public use or to acquiesce to a 66 feet width. Based on the *Texaco* decision, such acquiescence does not constitute a taking. Instead, it represents a constitutional exercise of state power.

The Petitioners attempt to distinguish *Texaco* by arguing that mineral rights at issue in *Texaco* and fee simple property rights are of such different character that *Texaco* should not apply. A careful reading of *Texaco* dispels this argument. The *Texaco* ruling was based in part upon previous United States Supreme Court cases which involved the extinguishment of a fee simple interest in property. For example, *Texaco* cited to *Hawkins v. Barney's Lessee*, 5 Pet. 457, 8 L.Ed. 190 (1831), in which the Court upheld a Kentucky statute that prevented a land owner from recovering property on which the defendant had resided for more than seven years under a claim of right. 454 U.S. at 526. *Texaco* cited to *Wilson v. Iseminger*, 185 U.S. 55 (1902), in which the Court upheld a Pennsylvania statute that provided for the extinguishment of a reserved interest in ground rent if the owner collected no rent and

made no demand for payment for a period of twenty-one years. Even though the effect of the statute was to extinguish a fee simple estate of a permanent duration, the Court still upheld the legislation as valid. 454 U.S. at 527. Indeed, as noted by Justice Stevens in his concurring opinion in *Hodel, supra*:

> The value of a property owner's interest does not provide a yard stick for measuring "the scope of the dual constitutional guarantees that there be no taking of property without just compensation and no deprivation of property without the due process of law".

481 U.S. at 726.

Therefore, the precise nature of the property right is not determinative of the takings issue. Consequently, the Petitioners' argument for distinguishing *Texaco* is simply invalid.

The Petitioners attempt to evade the *Texaco* precedent by citing to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1986). However, *Nollan* does not usurp Texaco's application here, *Nollan* is distinguishable from the facts of *Kentwood*. In *Nollan*, the governmental authority conditioned the issuance of a building permit, which represented a perfectly legitimate use of the property, on the land owner granting a public easement across his beach front. This case had nothing to do with a statute of uniform application conditioning a retention of a property interest on property owners performing an affirmative act within a prescribed period of time. *Nollan* did not involve a question of lapsed property interests through the property owner's failure to preserve them. Instead, the local government extorted a property right from a

specific property owner who had no opportunity to preserve his property interest. The Michigan Supreme Court's majority opinion in *Kentwood* correctly noted this significant difference between *Nollan* and Michigan's highway by user statute:

> The one notable difference between *Nollan* and this case is that Michigan has not required the original property owners to give the property to the state. Instead, the Michigan statute allows the land owner to assert the right to the property within ten years after the creation of the road as a public road by use. If ten years pass without continuous assertion of a right by the property owners, the law presumes that the owner intended to dedicate the entire four-rod width of the road. It is only after the property owners have failed to act to preserve their right to the property that the property is deemed dedicated to the state. Indeed, *Nollan* supports this. Where the property "[is] reserved by its owner for private use" the state may not take the property without just compensation. However, in this case the property owner did not reserve the property for private use because the property owner after reasonable notice, did not properly assert his right to the property within the ten year period.

581 N.W.2d at 679. *Kentwood* correctly determined that Michigan's statutory presumption or implied dedication is reasonable exercise of state power. The Petitioners' misuse of *Nollan* offers no basis for attacking this determination.

As part of their effort to discredit *Texaco's* application, Petitioners also misconstrue two other Michigan

Supreme Court decisions. Petitioners cite to *Smith v. State Highway Commissioner*, 227 Mich. 280, 198 N.W.2d 936 (1924). However, like *Eager*, this case represented occasion in which the property owner successfully rebutted the presumption of 66 feet wide right-of-way. In addition, the Petitioners mistakenly cite to *Alton v. Meeuenberg*, 108 Mich. 629, 66 N.W. 571 (1890). In *Alton*, the question involved the evidentiary standard for initially determining whether road had been established by public use, which then initiates the statutory time period for the rebuttable presumption. Whether or not a public road by use has been initially established is a distinct issue from whether the owner rebutted the statutory presumption of a 66 feet width.

Therefore, *Texaco* invalidates the Petitioners' takings claim. The Petitioners' Writ is as much a request to re-examine *Texaco* as it is to review *Kentwood*.

ARGUMENT II

Michigan's Highway By User Statute Does Not Violate Due Process Of Law.

Petitioners wrongfully contend that the statutory presumption offends due process of law. However, *Texaco* also readily answers this contention.[10] On page 19 of their brief, the Petitioners complain that the highway by user

---

[10] It should also be noted that the Michigan Supreme Court rejected a similar due process challenge to the Michigan's dormant mineral statute in *VanSlooten v. Larsen*, 410 Mich. 21, 299 N.W.2d 704 (1980), *cert. den.*, 455 U.S. 901 (1982).

statutory presumption violates procedural due process because it affords no notice to the property owner. This Court rejected the same argument in *Texaco*:

> Generally, the legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, the two year grace period included in the Indiana statute forecloses any argument that a statute is invalid because mineral owners may not have had the opportunity to become familiar with its terms. It is well established that persons owning property within a state or charged with knowledge of relevant statutory provisions affecting the control and disposition of such property.

454 U.S. at 532.

Given the history of the Michigan's highway by user statute, Petitioners have been on notice since before the Civil War. As early as *Bumpus*, 4 Mich. at 162-163, *supra*, and in other cases, the Michigan Supreme Court ruled that the statute places the property owner on notice that if the public makes use of a roadway across or upon their land for a period of eight or ten years, then the property owner must take action, either by instituting a lawsuit or by engaging in an open and notorious use that interferes with or disturbs the public use. In this regard, the Michigan Supreme Court in *Ellsworth* stated:

> The statute, in all cases is fair notice to the owner that if he means to dispute the rightfulness of the public uses, he must assert his right within the prescribed period and in some way calculated to interfere with, disturb or interrupt

> such use by the public, or by institution of the suit for the judicial determination of the right.

27 Mich. at 256.

As noted by the Michigan Supreme Court in *Kentwood*, the Petitioners have no cause to complain about lack of notice. If they are to complain, then the complaint must be directed to "the original property owners who dedicated their land for public use pursuant to the statute". 598 N.W.2d at 680.

Petitioners improperly argue that statute provides inadequate notice because of inconsistent legal interpretations. Once again, Petitioners' argument is based on their mischaracterization of case law. They cite to *Scheimer v. Price*, 65 Mich. 638, 32 N.W. 873 (1887), as creating confusion in the law, but *Scheimer* concerned whether the highway existed in the first place, not the width of highway. *See, Alton*, 66 N.W. at 574, *supra*. Petitioners cite to *Wayne County Savings Bank v. Stockwell*, 84 Mich. 586; 48 N.W. 174 (1891), *and Coleman v. Flint & P.M.R. Company*, 60 Mich. 160; 31 N.W. 47 (1887), but these cases represent yet more examples where the property owner rebutted the 66 feet presumption. As appropriately observed by Michigan Supreme Court in *Kentwood*, Petitioners' cases: "all dealt with defendants who were able to present evidence that would rebut the presumption. . . . " 581 N.W.2d at 680.

In their argument about the "confused" State of Michigan law, Petitioners conveniently overlook the clear line of precedents dating back to *Bumpus* and including *Krueger, Ellsworth, Campau v. City of Detroit, supra*, where the Michigan Supreme Court repeatedly upheld the

rebuttable presumption. In fact, as recently as 1986 in *Eyde Brothers Development Co. v. Eaton County Drain Comm'r*, the Michigan Supreme Court upheld a rebuttable presumption in clear and unambiguous terms: "[T]he width of the easement is not confined to the paved surface . . . but includes the entire four rod or sixty-six feet." 398 N.W.2d at 310. Even accepting for the sake of argument that Petitioners' "confusion" contention is credible, the Michigan Supreme Court, through *Kentwood*, clarified the law, eliminating any possibility of confusion. In particular, the Michigan Supreme Court restricted the *Eager* cases to those circumstances where the presumption has been rebutted. 581 N.W.2d at 677.

The Petitioners also complain that the highway by user statute violates due process because it unfairly shifts the burden of proof to the property owner. The Petitioners rhetorically ask on page 22 of their Brief, "How can a private property owner interfere with a nonexistence public use?" In answer, common sense dictates that the public use of private land as a road ought to serve as fairly conspicuous notice to the property owner. In fact, as noted in the *Alton* case, cited by the Petitioners, to establish a public use of private land, the use must be open and notorious. 66 N.W. at 574. Under the statute, the fact that the public use may not initially utilize the entire 66 feet public right-of-way, does not defeat the presumption or implied dedication, unless the property owner takes action within the prescribed time period to assert his rights.

Petitioners wrongfully complain that the burden of proof placed on the modern day property owner is virtually insurmountable. They lament that present day

property owners are disadvantaged by the passage of time, death of a previous title holder, loss or destruction of records, or the removal of identifying features which might evidence an owner's intent to restrict use of the highway. These difficulties are apt to occur in a case where the Petitioners have challenged the validity of the statute that has existed in its essential form for over 160 years. In fact, as far as the City is concerned, these difficulties justify the presumption of 66 feet. The presumption serves a valid public purpose of creating some certainty as to the width of roads and clarifying the expectations of past, present and future private property owners. As noted by the Michigan Supreme Court in *Kentwood*:

> Because the burden is placed on the original property owner to rebut the presumption, the burden would remain with subsequent property owners to provide evidence that the presumption was rebutted. It would be illogical to shift the burden back to the government once the public is deemed to be the legal owner of the property.

581 N.W.2d at 680, n.10.

The highway by user presumption is not violative of substantive or procedural due process. As demonstrated by *Texaco*, the publication of the statute itself provides notice. 454 U.S. at 532. Certainly, a prescribed period of eight to ten years is reasonable. *Compare with United States v. Locke*, 471 U.S. 84, 108-109 (1985) (automatic forfeiture of mineral claims by missing annual filing notice by one day after receiving misinformation from a governmental official did not violate due process).

CONCLUSION

This is not a "takings" case. Instead, this case represents an improvident challenge to the lawful exercise of a state's power to define the scope of a property right. The fact that Michigan's highway by user statute, which dates back to 1838, conditions the retention of a property interest on an affirmative act of a land owner within a prescribed period of time, is neither repugnant to the takings clause nor to the due process clause of the United States Constitution. The Petitioners' Writ is answered by this Court's decision in *Texaco* which rejected the same takings and due process arguments. The Petitioners misplace their reliance on cases which are clearly distinguishable. Michigan's highway by user statute represents a reasonable exercise of state power and reasonable balancing of private and public interests.

Wherefore, the Respondent respectfully requests that this Court deny Petitioners issue of a Writ of Certiorari to review the decision of the Michigan Supreme Court.

Respectfully submitted,

ROBERTS, BETZ &
BLOSS, P.C.
Attorney for Respondent
City of Kentwood

Dated: February 3, 1999

MARSHALL W. GRATE
Business Address:
5005 Cascade Road, S.E.
Grand Rapids, MI 49546
Telephone Number: (616) 285-8899